

United States
Circuit Court of Appeals *7*
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and BELLINGHAM BAY IM-
PROVEMENT COMPANY, a Corporation,
Appellants,

vs.

ALBERT R. McPHEE and FRANCES McPHEE,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

FILED

JAN 15 1923

F. D. MONCKTON,
CLERK.

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In the District Court of the United States, in and for the Western District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY
and BELLINGHAM BAY IMPROVE-
MENT CO., Corporations,
Defendants.

Second Amended Complaint.

Plaintiffs bring this their second amended complaint, leave of the Court being had, and complaining of the defendants allege:

1.

At all times hereafter set forth plaintiffs were and are husband and wife, and defendants are corporations, doing business in the county of Whatcom aforesaid, and the property rights hereafter mentioned belong to the community estate of plaintiffs, and the things hereafter mentioned as done by plaintiffs were done by Albert R. McPhee for such community estate.

2.

Plaintiffs are the equitable owners, and in the possession of the following described lands, to wit:

The west half of the northwest quarter, and the northwest quarter of the southwest quarter of Section 12, in Township 39 North, Range 6 East, in Whatcom County, Washington.

3.

Plaintiffs deraign their right to the legal title of said land because of this: In the year 1901 said lands were a part of the unsurveyed public domain of the United States, subject to settlement and occupancy by persons qualified to enter lands, and acquire the title under the provisions of the homestead laws of the United States, relating thereto. In the summer of 1901, one C. C. Cole was a person over 21 years of age, qualified to enter [21*] the public lands of the United States, and acquire title thereto under such homestead laws; and said Cole settled upon said lands and claimed the same with the intention of acquiring title as a homestead when said lands should be open to such entry.

Said Cole erected a home, opened roads, and proceeded to improve the same until in the month of October, 1901, when he sold his improvements and right of occupancy to one Daniel O'Donnell, who was a citizen of the United States, and qualified to enter lands and acquire title under the homestead laws, and he at once took possession of said lands with the intention of acquiring title thereto, under the homestead laws, and he established a residence thereon, built houses and sheds, fenced and cleared ground, and posted notices showing the particular lands claimed by him, and continued to reside on said lands until in the spring of 1906, when for a valuable consideration he sold and conveyed his possessory rights to one Thurston, who entered upon said lands for the

*Page-number appearing at foot of page of original certified Transcript of Record.

purpose of acquiring title, and he was a qualified citizen and entitled to enter public lands, and he so entered this land for the purpose of acquiring title under the homestead laws and so continued in possession until in November, 1906, when he, for a valuable consideration, sold and conveyed his improvements and possessory rights to said lands to Peter Beebe. Said Beebe was a citizen of the United States and qualified to enter such land, and at once entered into possession of such land with the intention of acquiring title thereto from the United States under the provision of the homestead laws, and he made improvements and occupied such land for the purpose aforesaid.

While said Beebe was so in possession, and in the month of September, 1909, and for a valuable consideration, he sold and conveyed his possessory rights, and the improvements on said lands to plaintiffs and relinquished said rights; and plaintiffs at once entered into possession of said lands, for the purpose and with the intention of acquiring the title thereto from the United States [22] under the provisions of the homestead laws, plaintiffs being and are citizens and qualified to take lands as aforesaid.

That plaintiff and his several grantors have at all times been in the continued open and peaceful possession of said lands, claiming adversely to all the world, except the United States, and each has made improvements and kept posted on the land and on each subdivision thereof, notices showing the land claimed by right of such possession and the inten-

tion to claim the same as a homestead, and plaintiffs have for ten years resided on, cleared land, built houses, fences, roads, and raised stock and crops thereon.

4.

On the 19th of May, 1902, and while the land was actually occupied and being improved by O'Donnell and still unsurveyed, the Great Northern Railway Company under the name of St. Paul, Minnesota & Manitoba Railway Company, and for the use in part of the Bellingham Bay Improvement Company filed in the office of the United States Land Office at Seattle, list 44, selecting said land amongst others as a lieu selection under the provisions of the act of Congress approved August 5th, 1892.

In making said selection said defendant represented said land as open, unoccupied, and not claimed by anyone and free from any claim of homestead or initiated right of settlement, and such statements were believed by the officers of the Department of Public Lands and such list was filed in such belief.

5.

Said land was surveyed on February 6th, 1907, and on the 23d of said month defendants described said lands conformable to such survey, which exactly conformed and described the lands herein described and claimed by reason of the possessory rights and improvements made thereon, and the notices posted as aforesaid defining on the ground, the land itself.

6.

When the said selection was made and when it was made to [23] conform to the survey of said lands, defendants knew of the rights and claims to the same by plaintiff and his grantors, and that the same were claimed and settled upon, and that homestead rights in and to the same had been initiated and were being actively asserted, notwithstanding they represented to the Department of Public Lands, and the officers of the Land Department, such lands to be open and free from adverse claims or initiatory rights which such officers believed and acted upon.

7.

On September 27th, 1909, plaintiffs made application to file their homestead entry on and for said lands, tendered the money therefor to pay for such right and filing to the officers of the United States Land and Office at Seattle, which application was rejected without inquiry or investigation by such officers, because of their belief of the representations by such defendants and the filing of said selection list 44.

From such decision plaintiffs were advised to appeal, and did appeal, to the Commissioner of the Land Department, and such rejection was affirmed on December 8th, 1910, the plaintiffs set forth in their appeal proof of the prior occupancy and improvement of such land for the purpose of homestead entry. Afterward said application was appealed to the Secretary of the Interior.

8.

With the application aforesaid, affidavits were presented to the Land Department as hereafter set out, showing the source and nature of plaintiffs' right and afterward on November 18, 1914, the Secretary denied the appeal. On April 8, 1916, plaintiff filed a petition with the Department for the exercise of supervisory authority and with such petition, and as part thereof, presented affidavits. Such proceedings were had thereon that plaintiffs were denied all relief and their application to enter such land was denied. A copy of such proceedings and all the proceedings in the Land Department are herewith filed, hereto attached marked Exhibit "A" and made part hereof. [24]

9.

Afterwards, and while plaintiffs' application was pending, said Thurston made application to enter the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 1, and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 12, aforesaid, and was permitted by the Land Department to acquire the same. In establishing claim to such land said Thurston represented he was then the owner of the improvements of O'Donnell and that such improvements were on the land he was then seeking, and concealed the fact from the Land Department that such improvements were on the land claimed by plaintiffs, and concealed the fact that he had sold and conveyed to plaintiffs' grantor such improvements, and that plaintiffs were the owners and in possession of the lands entered, and improvements made by O'Donnell and Cole, and adding to such improvements; and he concealed

from plaintiffs the fact he was making use of such improvements for any purpose. The record and proceedings in the Land Department by said Thurston in acquiring the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, of Sec. 12, are filed herewith and made part hereof, marked Exhibit "B".

10.

That said land had become segregated by the occupancy of plaintiffs' grantors, and was not open to selection by the defendants when list 44 was filed.

That the filing of list 44 was a fraud upon plaintiffs' grantors, making defendants trustees for plaintiff in obtaining the patent by misleading the officers of the Land Department.

That the officers of the Land Department erred in judging the land subject to selection by list 44.

That such officers erred in judging plaintiffs were not in privity with Dan O'Donnell in possession and occupancy and right to said land.

That such officers erred in judging that the improvements made by O'Donnell on the West half of Section 12, could be shown by Thurston for obtaining patent to the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ Sec. 1, and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Section 12. [25]

That said officers erred in judging that because of the use made of plaintiff's improvements, by Thurston, subsequent to his alienation of the rights to the succession of O'Donnell would exclude plaintiff's rights to such land.

That said officers erred in judging the improvements made by O'Donnell and shown by Thurston in

making his final proof were upon the land sought and claimed by plaintiff.

That said officers erred in judging that because Thurston had used plaintiff's improvements in his showing of proof, plaintiffs should have protested, notwithstanding Albert R. McPhee was during all such period actually asserting his right to enter such land before the Department because of his ownership of such improvements and asking such officers to hear his proofs and protest his rights.

That said officers erred in judging that by their assertion that Thurston had used plaintiff's improvements in acquiring other lands after a "field survey" they could excuse their mistake by refusing a hearing permitting plaintiff to show his ownership and occupancy of the land on which improvements existed.

11.

That the officers of the Department aforesaid erred in law, in that plaintiff was refused the right to make proof of his occupancy and the occupancy of his grantors, and have given him the preference right to complete his homestead title to said lands.

12.

That defendants by their representations and concealments aforesaid committed a fraud upon the plaintiff, and their rights, and misled the officers of the United States into error of law regarding plaintiff's equities in said land.

13.

That by reason of said several facts the said lands were not open to be taken by such selection 44, and

have never been in law open to such taking and are not now so open. [26]

14.

On the 24th day of July, 1919, the Land Department, acting on the belief of the truth of the representations and concealments and in error of the legal rights and equities of plaintiffs, issued a patent conveying the legal title of said lands away from the United States to the defendant, Great Northern Railway Company, and it at once conveyed to the codefendant some interest in said land, the extent and nature of which plaintiff cannot definitely say, but by reason of which both defendants are asserting the right to dispossess plaintiff, and deprive them of any right to or further occupancy of such land and are asserting the full ownership thereof solely because of such patent, notwithstanding both defendants had at all times since the placing of list 44 full knowledge of plaintiff's claims and rights to said land and full knowledge of their continued adverse possession under claim of right for more than ten years last past; and the continuous improvements being constantly made by plaintiffs on said lands under such claims.

15.

That a large growth of valuable timber covers a portion of said land, but the land is valuable as productive agricultural land when the timber has been removed, and defendants are asserting they will at once cut and remove such timber and deny plaintiffs any right thereto and to their entire loss, and will do so unless the relief hereafter asked is given.

WHEREFORE plaintiffs pray that defendants be adjudged to hold the legal title to said lands for the use and advantage and benefit of plaintiffs, and declared and adjudged trustees thereof for plaintiffs. That they be required to convey the fee of said lands to plaintiffs; that upon the final hearing they be forever enjoined from asserting any claim to such land, and from removing any timber therefrom; and as to any timber removed pending the hearing of the case on its merits, they be held liable as trespassers and required to pay damages therefor; and failing to comply with any decree the court quiet plaintiff's title to said [27] land and a commissioner be named to convey the same, and they pray for all proper relief in the premises.

S. M. BRUCE,
Attorney for Plaintiffs,
First National Bank Building,
Bellingham, Wash.

State of Washington,
Whatcom County,—ss.

Albert R. McPhee on oath says he is one of the plaintiffs, knows the contents of the foregoing complaint, and the allegations thereof are true.

ALBERT R. MCPHEE.

Subscribed and sworn to before me this 6th day of December, 1920.

[Seal] D. W. FEATHERKILE,
Notary Public in and for the State of Washington,
Residing at Bellingham.

Copy received.

C. W. HOWARD,
For B. B. I. CO.
THOMAS BALMER,
For G. N. Ry. Co. [28]

Exhibit "A."

DEPARTMENT OF THE INTERIOR.

HOMESTEAD ENTRY.

U. S. LAND OFFICE, Seattle, Wash.

Serial No. 01723

Receipt No. 158923

APPLICATION.

I, Elbert R. McPhee, a resident of Glacier, do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ & NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Section 12, Township 39 N., Range 6 E., W. M. Meridian, containing 120 acres, within the Seattle land district; and I do solemnly swear that I am not the proprietor of more than 160 acres of land in any State or Territory; that *I native* born citizen of the United States, and am head of a family; that my postoffice address is Glacier, Washington; that this application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for;

that I am not acting as agent of any person, corporation, or syndicate in making this entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which I may acquire from the Government of the United States will inure in whole or in part to the benefit of any person except myself. I further swear that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; and that I have not heretofore made any entry under the homestead laws, except _____

Here describe former homestead entry, etc.

that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined the same; that there is not to my knowledge within the limits thereof any vein or lode or quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit

of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any Indian.

ELBERT R. MCPHEE. [29]

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known or has been satisfactorily identified before me by J. C. Graffin, M. D.; that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described.

And sworn to before me, at my office, in Maple Falls, Whatcom County, Washington, within the Seattle Land District, this 25th day of September, 1909.

C. W. BEAL,

U. S. Commissioner. [30]

UNITED STATES LAND OFFICE.

Seattle, Wash., Sept. 28, 1909.

Mr. Elbert R. McPhee,
Glacier, Wash.

Sir:

Your application to enter under Section 2289, R. S., the W.1/2 NW.1/4 and NW.1/4 SW.1/4, Section

12, Tp. N., R. 6 East, Will. Mer., was received at this office September 27th, 1909. With your application was Money Order for \$10.00 and relinquishment by Peter Beebe of land you applied for. Relinquishment had been placed on record. Enclosed is receipt No. 158923 for the money you paid. Check for \$10.00 will be sent you on application.

Notice is hereby given that your application has been rejected by the Register and Receiver of this office, subject to your right of appeal to the Commissioner of the General Land Office at any time within thirty days.

This land was covered by a lieu selection by the St. Paul, M. & M. Railway Company, long prior to time Peter Beebe, whose relinquishment was with your application, claimed to have settled on the land. List 44 by the Railway Company was approved May 9th, 1902. Beebe claims that he settled on the land August 16th, 1906. When the tracts were selected by the Company in 1902 they were vacant and public.

Beebe's application for the tract was rejected by this office and we were sustained by the Commissioner of the General Land Office.

Very respectfully,

JAMES HENRY SMITH,

Register,

T. H. TWICHELL,

Receiver. [31]

IN THE GENERAL LAND OFFICE OF THE
| UNITED STATES OF AMERICA,
WASHINGTON.

To the Commissioner of the General Land Office,
GREETING:

Comes now your petitioner Elbert R. McPhee, a citizen homesteader of the State of Washington, and a resident of Township (39) and residing on the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Section 12 of said Town and in Range 6 E. W. M. in Whatcom County, Washington, and most respectfully represents:

That on the 29th day of August, 1909, your petitioner purchased the homestead right to the hereinbefore described lands from one Peter Beebe, who thereupon made and executed a relinquishment to said lands, and the same has been placed of record in the local land office at Seattle, Washington, together with the fee for re-entry in your petitioner's name.

That the former homesteader had commenced and continued permanent improvements on said lands, by erecting a house and commencing the clearing of the same, and that the same have been continued by your petitioner who is a resident of said land with his family.

While the former homesteader located on said land on the 16th of August, 1906, some time prior to the accepting of the final survey of said lands by the Government, and long prior to the opening of said lands for entry by the Government.

That the grounds of rejection by the local land office, are that the St. Paul, M. & M. R. Co. made selection of said lands in May, 1902, that being at a time when said lands were unsurveyed, and not in the market, and not subject to settlement, except by squatter homesteaders.

Your petitioner contends that said lands were not open to entry either by corporations as lieu lands or any other person, save and which took place on the 6th of February, 1907.

That the grounds of rejection of affiants tendered entry on said lands as a homestead was and is, that the St. Paul, M. & M. Ry. Co. made selection of the said lands in 1902, as lieu lands and placed scrip thereon, yet that was at a time when said lands were [32] unsurveyed and not open to entry, or we claim to selection by anyone except by squatter settlers, with a view to a future entry, at such time as the same were open for settlement, and affiant contends that no *froffer* of scrip, or other entry was legal or properly entertained, at that time, but that an actual settler with the intent of making a homestead, and a home on said lands at such time as they might become available, had a squatter's right so to do, and if he showed his good faith by improving or cultivating the land would be entitled to the first consideration, whenever the said lands were duly placed in the market by the Government. It is further respectfully shown that the records of your department will show that at least on two occasions subsequent to the placing of scrip by the said R. R. Co. these and adjacent

lands were withdrawn from the list of public lands, as such, and placed in the forest reserve, such being the fact if the railroad had any vested rights in said lands these acts divested them of them, and they were in their former position, in being entitled to lieu scrip, which could be placed on vacant lands susceptible of being entered; and in no way could said railroad vest title in themselves, except by relocation at such time as the lands were again thrown into the public domain, this the records of your office will show was never done, and at the time of the locating of the predecessor of your appellant, and assignor of his interest he became the first claimant when the time of entry did come, and to that end due tender of the required fee was made, and tender of a homestead entry after the said lands were thrown open on the 6th of February, 1907. In view of the fact that the Railway Company's claimant never made a new entry or in any manner reinstated themselves, gives them no right to claim possession and ownership to certain lands (being the ones in controversy) which at the time of their pretended selection could not be defined by metes and bounds, and seemingly could have been shifted to any section where the lands were the most valuable, regardless of prior claimant, or other rights of any kind or character.

In view of the foregoing facts appellant claims that the Ry. [33] Co. claimant has allowed its rights to lapse, and should be declared without claim or title in or to said lands described, while on the other hand the homestead claimant, and his

successors in interest have complied with all the requirements, and tendered his entry fee, should be declared the sole and legitimate owner, and have the sole and only right to the lands in controversy.

WHEREFORE: Appellant prays, that the matter in controversy be remanded back to the local land office for a hearing on its merits, and that your appellant be heard as to his claims and rights in the premises, to the end that justice may be done to the honest claimant, and the ends of justice subserved.

J. N. PHILLIPS,
Attorney for Appellant.

State of Washington,
County of Whatcom,—ss.

Elbert R. McPhee, being first duly sworn, on oath says that he is the homestead claimant, and appellant hereinbefore mentioned, that he has caused the foregoing appeal to be prepared, and the enclosed notice of the same served on the appellant, that he has read and knows the contents of the foregoing appeal, and that the same is true to the best of his knowledge and belief.

ELBERT R. MCPHEE.

Subscribed and sworn to before me this 23d day of October, A. D. 1909.

J. N. PHILLIPS,
Notary Public in and for the State of Washington,
Residing at Bellingham. [34]

(Copy)

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

Washington, May 7, 1910.

Homestead Application 01723

Held for rejection subject to
appeal.

ELBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY COMPANY.

Register and Receiver,
Seattle, Washington.

Sirs:

On September 27, 1909, Elbert R. McPhee filed homestead application 01723, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E.

In May, 1902, the St. Paul, Minneapolis and Manitoba Railway Company selected said tract of land per list 44, under the act of August 5, 1892 (27 Stat. 390). The plat of survey for the tracts in question was filed in the local office on February 6, 1907, and on February 23, 1907, the company described anew the same lands, as conforming to the survey.

You rejected McPhee's application to make homestead entry for the said W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., for the reason that the land had been selected by said railway

company, May 9, 1902, per list 44, and which was adjusted to the survey on February 23, 1907.

From your action Elbert R. McPhee filed an appeal to this office, based on the ground that, on August 29, 1909, he purchased the homestead right to the tracts in question from one Peter Beebe, who alleged settlement upon the land August 16, 1906, and relinquished his claim to the same to said Elbert R. McPhee. [35]

No. 16930, P. 2.

It appears that, when the company made its selection of these tracts of land, May 9, 1902, they were vacant public lands, and the tracts specified as a basis for the selection were situated within the limits of its grant and relinquished at the request of the department, under act of August 5, 1892, *supra*, and became a proper basis of the selection of other lands in lieu thereof. Your action is therefore approved, and applicant is allowed sixty days after notice within which to appeal to the Secretary of the Interior.

You will notify him hereof and also notify Thomas R. Benton, St. Paul, Minnesota, attorney for said railway company.

In due time make proper report as to the action taken by Elbert R. McPhee in the premises.

Very respectfully,

S. V. PROUDFIT,

Assistant Commissioner.

BOARD OF LAW REVIEW.

By W. B. PUGH. [36]

In the Interior Department of the United States
of America, Washington, D. C.

No. 01723.

APPEAL TO THE SECRETARY OF THE
INTERIOR.

ELBERT R. MCPHEE,

Appellant,

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA RAIL-
WAY COMPANY.

In re the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the
SW. $\frac{1}{4}$, Section 12, Township 39 N. of R. 6 E.

Comes now the appellant and appeals from the
order of the General Land Office rendered in this
case, wherein the finding of the local land office
rejected appellant's application for a homestead
entry on the above-named lands, and for the rea-
sons following, to wit:

I.

The present occupant, your appellant, succeeded
to the rights of the original squatter homesteader,
Al. Small, who *abandon* all rights, on September
27th, 1909, by filing of homestead application No.
01723 for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$
of the SW. $\frac{1}{4}$ of Section 12, Township 39 N., R. 6
E., Whatcom County, Washington.

II.

That said appellant purchased the right to the
improvements on the lands claimed, from one Peter

Beebe, who was the original successor of one Dan O'Donnell, who in September, 1896, went upon and claimed said land as a homestead and improved said lands prior to the official survey thereof and long prior to any attached rights on the part of the script claimants, to wit, the St. Paul, Minneapolis & Manitoba Railway.

III.

That on May 9th, 1902, at which time said script selection was made, the said lands were not vacant lands, but were claimed as a homestead and improved, and had been by the said — O'Donnell and his predecessor in the premises.

IV.

That any declaration of intention to occupy public lands [37] on the part of a citizen claimant is to be recognized above and beyond that of any corporation, script claimant coming in later upon said lands.

V.

That at the time it is claimed by the St. Paul, Minneapolis & Manitoba Railway that they placed lieu script upon said lands, the same had been improved to an appreciable extent, and a house and outbuildings constructed, and visible and prominent extension of residence and improvement duly made upon said lands.

VI.

That no right of said lieu script claimant could attach to the lands herein mentioned at a time when said lands were duly occupied and claimed by the legislative claimant.

VII.

That the purview of the law governing settlers' rights is first to conserve all of their interest before admitting any advance claim. That all the files and papers in this case in the archives of the department are made a part of this appeal.

WHEREFORE your petitioner would most respectfully ask that the decisions of the local and general Land Office be reversed, at least in so far as to grant appellant petitioner the right of a review, and that all matters in controversy may be taken up and heard before the local land office in the land district of Northern Washington at Seattle in said state, in order that substantial justice may be done to all parties concerned.

J. N. PHILLIPS,
Attorney for Appellant.

State of Washington,
County of Whatcom,—ss.

Albert R. McPhee, being first duly sworn, deposes and says: That he is the appellant in the foregoing petition, and that he has read the same and knows the facts therein contained and that the same is true to the best of his knowledge and belief.

ELBERT R. MCPHEE.

Subscribed and sworn to before me this 23 day of June, 1910.

J. N. PHILLIPS,
Notary Public in and for the State of Washington,
Residing at Bellingham. [38]

(Copy)

DEPARTMENT OF THE INTERIOR,

Washington. Dec. 8, 1910.

“F”

Seattle 01723.

Homestead Application Rejected.

Affirmed.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

APPEAL FROM THE GENERAL LAND
OFFICE.

Albert R. McPhee appealed from the decision of the Commissioner of the General Land Office of May 7, 1910, rejecting his application for homestead entry for W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., Seattle, Washington.

May 9, 1902, the St. Paul, Minneapolis and Manitoba Railway Company, by List 4, selected this land under act of August 5, 1892 (27 Stat. 390). The land was then unsurveyed. February 6, 1907, the approved plat of survey was filed in the local office, and February 23, 1907, the railway company adjusted its selection to the surveys. September 27, 1909, McPhee applied for homestead entry, which the local office rejected for conflict with the railway selection, and that action on McPhee's appeal was affirmed by the Commissioner.

McPhee asserts that he is assignee of the rights of a former settler, whom he names in his appeal from the local office as Peter Beebe and in his appeal from the Commissioner of the General Land Office as Al Small, both of whom he says were successors of Dan O'Donnell, who, in September, 1896, went upon and claimed said lands as a homestead and improved them prior to the survey and long prior to any rights on part of the railway company. McPhee claims to have purchased this settlement right September 27, 1909. [39]

Decision No. 17440, P. 2.

There is no evidence in the record of these successive assignments, nor allegations of the time when they were made—if any were made. For all that appears in the record, the alleged former settlers merely abandoned their rights, and McPhee's claim of right appears to have been initiated merely by him as an original settlement. McPhee claims that the land was not subject to selection by the railway company and further that the railway company can not select unsurveyed land. The act of August 5, 1892, *supra*, allows the railway company to select any land "not reserved and to which no adverse right or claim shall have attached, or have been initiated at the time of the making of such selection." It further provides that: "In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company shall describe such tract in such manner as to designate the same with a reasonable degree of certainty, and within the period of three months

after the land including such tract shall have been surveyed, and the plats thereof filed in the local land office, a new selection list shall be filed by said company, describing such tract according to such survey." The act of itself contemplates clearly that unsurveyed lands may be selected. The selection was before inception of McPhee's claim. No error is shown therefore in the decision, and it is affirmed.

(Signed) FRANK PIERCE,
First Assistant Secretary. [40]

DEPARTMENT OF THE INTERIOR,

WASHINGTON, D. C.

Seattle "F" 01723.

E—4436.

ELBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA RY.
CO.

BRIEF OF J. H. CANNON.

To the Honorable Secretary of the Interior:

I.

Said homestead appellant most respectfully urges that a meritorious right to a review of the former decision is vested in said homestead applicant for the reason that said showing and deraignment of the right or title of claimant was not shown in his former hearing in reference to said land and that he was not personally to blame.

II.

That said applicant had an attorney to look after his cause and solely relied upon his preparation of the cause and if a defect in the record was in said cause it was not the fault of said applicant, and he should not suffer this great injury and irreparable wrong, hence in justice we request said Honorable Secretary to review said cause and take into consideration said cause with his additional affidavits.

III.

That said applicant's showing places the right to said land in him as the affidavits of Peter Beebe, H. E. Leavitt, Fred Benson and himself shows this to be the state of facts connected with said land:—said Peter Beebe owned or claimed other land; he made an exchange some time in October, 1906, with J. W. Thurston for an eighty acres of this land; said Thurston being a successor to one Dan O'Donnell who was occupying said land which said McPhee acquired with improvements thereon at the time, viz., May 9th, 1902, when said scrip claimant made the selection of said land hence said land was not subject to scrip location; this fact has been determined by your Honor in the case of John W. Thurston vs. St. Paul, Minneapolis & Manitoba [41] Railway Co.—decided upon March 19th, 1910—being Department No. “E-2630—which said decision I am unable to get the official report in book form but said case was decided by the same Honorable Assistant Secretary, the Honorable Frank Pierce; which held in said cause that if these im-

provements were upon said land then the same was not subject to be located as script land.

IV.

That I most urgently assert that the same improvements which was taken into consideration in said cause is the same identical improvements and were then owned and held by said McPhee and are upon his land; hence I most respectfully urge that said case be taken into consideration by this Honorable Department as a part and parcel of this McPhee case as very material.

V.

That it was there decided that these improvements were upon the land of Thurston and occupied by O'Donnell; hence the preference of homestead claimant was allowed so the only question to be determined is, whose improvements were these. We have established by voluminous evidence showing that they were and always have been upon the McPhee land; hence this is the question only.

I herewith produce four affidavits to that fact together with photo of the same, also showing McPhee successor proper down to and including O'Donnell; hence a conclusion that McPhee is entitled to this land in preference to said scrip claimant, said defendant.

VI.

And I further urge that if this department is not satisfied as to the exact location of said building then an inspection or field officer be sent out to inspect and report and said applicant has *no fear* of the result.

VII.

I will not encumber the time of the Department by citing authorities upon the point that if land unsurveyed or surveyed is improved, occupied, reserved or an adverse claim has been initiated or [42] attached as the act of March 2d, 1899—30 St. 933, expressly points this and is so held by said Department in:

Luts vs. Northern Pacific Ry. Co. 37 Dec. Dept. of Interior, p. 37.

Frank — vs. Northern Pacific Ry. Co. 37 Dec. Dept. of Interior, p. 193.

Frank — vs. Northern Pacific Ry. Co. 37 Dec. Dept. of Interior, p. 502.

and this Thurston case decided March 19th, 1910.

Hence I urge that, upon review, this land with improvements should be found upon McPhee's land, then a hearing should be ordered between McPhee and this scrip claimant and for such further orders in the premises as your Honor thinks proper.

J. H. CANNON,

Attorney for Claimant Albert R. McPhee. [43]

(Copy)

No. 17440.

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.

Washington, January 19, 1911.

ALBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY COMPANY.

DEPARTMENTAL DECISION OF DECEMBER
8, 1910, PROMULGATED.

Register and Receiver,
Seattle, Washington.

Sirs:

I enclose herewith two copies of departmental decision of December 8, 1910, in the case of Albert R. McPhee, against the St. Paul, Minneapolis and Manitoba Railway Company, involving the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., which affirmed the decision of this office of May 17, 1910, rejecting the homestead application of Albert R. McPhee.

You will notify Albert R. McPhee hereof, and duly report the action taken thereunder, with evidence of service of notice at the expiration of the time allowed for filing a motion for review. See Rules of Practice 76, 77, 78, and circular of March 1, 1900 (29 L. D. 649).

You will notify Thomas R. Benton, St. Paul, Minnesota, attorney for the St. Paul, Minneapolis and Manitoba Railway Company hereof.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner. [44]

DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C.

Seattle "F" 01723.

Homestead Application of Albert R. McPhee.
E—4436.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

MOTION FOR REVIEW OF DECISION OF
SEC. OF INTERIOR OF DECEMBER 8,
1910, SERVED BY LOCAL LAND OFFICE
OF SEATTLE, MARCH 22d, 1911, BY REG-
ISTERED LETTER.

Comes now the homestead applicant and moves
your Honorable Department for a review or re-
hearing of said Decision and for cause alleges:

I.

That the land involved in this application is the
W. $\frac{3}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec.
12, T. 39 N. R. 6 E. W. M. Seattle, Land District.

II.

That the claim of title or right to said land by

McPhee is as follows: That upon the south forty acres of the W.1/2 of NW.1/4 is the improvements of former claimants "Al Small" and "Dan O'Donnell" J. W. Thurston—Peter Beebe and Final Claimant.

III.

That this Honorable Department did, in decision rendered by it upon March 19, 1910 in case No. "E-2630" case of John W. Thurston v. St. Paul Minneapolis & Manitoba Ry. Co. hear and decide that it was shown that by corroborated affidavits that said land was occupied and improved by "Dan O'Donnell" upon the 9th day of May, 1902, the date of the selection by said Scrip Claimant and therefore not subject to scrip entry; and that *a hearing was ordered*, assuming the position that said O'Donnell *improvements* was upon other land of Thurston's adjoining this [45] claim now in controversy; said Decision being made by the Honorable First Assistant, Sec. Frank Pierce; which said Decision applicant expressly refers your Honor to. And affidavits therein and make it a part of this, his Motion for Review.

IV.

That the real facts are that said improvements are upon the McPhee Homestead or land and were so erected and built there; and not upon the land sought by said Thurston; and in no way connected therewith; that said McPhee owned the same and succeeded to the same by virtue of the purchase of the same from one Peter Beebe, which is fully set

forth in accompanying affidavits submitted herewith.

V.

That in said decision it was intimated that the Records did not show these facts, but we assert that it was not the fault of said Homestead applicant.

VI.

That said homestead applicant prays for a Review of said cause and to take into consideration said additional affidavits so that justice will to him be done.

VII.

That said applicant be granted a filing upon said land or that this Honorable Department order a hearing to determine the rights of said applicant and said scrip claimant and for such further orders as may seem meet and according to law.

J. H. CANNON,

Attorney for Albert R. McPhee, Maple Falls, Washington. [46]

State of Washington,
County of Whatcom,—ss.

Peter Beebe, first after being duly sworn, say that I am a native born citizen of the United States of the age of 54 years. My postoffice address is Glacier, Washington. I have resided in Whatcom County, State of Washington for nine years last Past next preceding the making of this affidavit. That I have been acquainted with the lands in Sec. 12 T. 39 N. R. 6 E. since the 18th day of August, 1906. That I did have a homestead in said sec.

and in Sec. one adjoining the same. Firstly being the $S.1\frac{1}{2}$ of $SW.1\frac{1}{4}$ of Sec. 1 and the $N.1\frac{1}{2}$ of the $NW.1\frac{1}{4}$ of Sec. 12. That I held the same until on or about the *month of November*, 1906 at which time I entered into an agreement or exchange with J. W. Thurston who postoffice address is Glacier Wash under the following condition that for the sum of \$50.00 paid me by said Thurston I then transferred my right of claim holding *first* to the $SW.1\frac{1}{4}$ of the SWP. of Sec. 1 & $W.1\frac{1}{2}$ of $NW.1\frac{1}{4}$ & $NW.1\frac{1}{4}$ of $SW.1\frac{1}{4}$ of Sec. 12 all of said land being in T. 39—N. R. 6 E. W. M. That I made final proof upon the 40 acres in Sec. 1 on October 5—1909; That on or about the 20th day of Sep 1909, I released the land in Sec. 12 and sold my improvements thereon to Elbert R. McPhee for the sum of \$50.00 and he with his family has resided continuously and now resides upon said land.

PETER BEEBE.

Subscribed and sworn to before me the 17th day of April, 1911.

[Seal]

J. H. CANNON,

Notary Public in and for the State of Washington,
Residing at Maple Falls. [47]

DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C.

Seattle "F" 01723.

E—4436.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

State of Washington,
County of Whatcom,—ss.

AFFIDAVIT OF H. E. LEAVITT.

I, H. E. Leavitt first after being duly sworn say that I am a resident of Whatcom County, State of Washington. That my postoffice address is Maple Falls, Washington that I have been acquainted with the land in Sec. 12, T. 39 N. R. 6 E., and especially the $W\frac{1}{2}$ of the North $W\frac{1}{4}$ of said section, both before and after the survey of the same that I have been acquainted with said land for 10 years last past next preceding the making of this affidavit; that the accompanying photograph is a true picture of said O'Donnell cabin upon the south forty acres of said land taken from an Expose at the North end thereof; that said cabin has been at all times upon said land since the Fall of the year 1901. That in the month of April 1902 I was at said cabin and the same occupied and owned at said time by Dan O'Donnell; he had stove provisions and bed and used it as his home; that said cabin is upon the land or claim of said claimant Albert R. McPhee and

said photograph contains the likeness of said McPhee and Family who not reside upon said land but not in this cabin.

H. E. LEAVITT.

Subscribed and sworn to before me this 18th day of April, 1911.

H. J. STRICKFADEN,
Notary Public in and for the State of Washington,
Resident at Maple Falls. [48]

DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C.

Seattle "F" 01723.

E—4436.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

AFFIDAVIT OF FRED BENSON.

State of Washington,
County of Whatcom,—ss.

I, Fred Benson, first after being duly sworn say that I am a native born citizen of the United States My postoffice address is Glacier Washington That I have been acquainted with the land in Section 12, T. 39 N. R. 6 E. for the last six years last past next preceding the making of this affidavit, as particularly the south forty of the west $\frac{3}{4}$ of the NW. $\frac{1}{4}$. That I know of my own personal knowledge for the last five years that the Dan O'Donnell improvements was made and are upon said forty

last aforesaid and upon the land claimed by said Albert R. McPhee That I have considerable experience as a photographer and the accompanying photo is a true fac simile or representation of the building or improvements made by said "Dan" O'Donnell as his predecessors' upon said land and the same represents said claimant Albert R. McPhee and family at said cabin upon his said claim that said McPhee does not now reside in said building but has erected him an other residence upon said land.

FRED BENSON.

Subscribed and sworn to before me this the 18th day of April, 1911.

[Seal] H. J. STICKFADEN,
Notary Public in and for the State of Washington,
Residing at Maple Falls. [49]

DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C.

Seattle "F" 01723.

E—4436.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

AFFIDAVIT OF ALBERT McPHEE.

State of Washington,
County of Whatcom,—ss.

Albert R. McPhee, first after being duly sworn say that I am the claimant in said cause and that

my postoffice address is Glacier, Washington. That I have at all of the times since holding and occupying said land been duly qualified to hold land as a homesteader under the laws of the United States. That I have with my wife and family of three children continuously reside upon said land since the month of September, 1909. That at said time I purchased the improvements upon said land from one Peter Beebe who was a qualified homesteader under the laws of the United States, paying him therefor \$50.00. Said improvements consisting of a building and a small amount of clearing and trail upon said lands the same being and consisting of log and frame building being about 16x18 feet in size with floor, windows and door and reasonably complet and had been used and resided in by one Al. Small and one Dan O'Donnell. That said improvements were upon the south forty acres of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 12, T. 39 N., R. 6 E. and upon the land prior to my acquiring the same and held by Peter Beebe, who had held the same and acquired the same from one J. W. Thurston, the said Beebe and Thurston in so arranging their respective claims so as to come and near to the County road. Said Thurston had paid and did pay said Beebe \$50.00 and surunder to said Beebe possession of said W. $\frac{1}{2}$ of NW. $\frac{1}{4}$. Said Thurston being a successor to said land from and through one Dan O'Donnell; who as affiant verily believes held and accepted said land and resided in said [50] residence upon May 9th, 1902, the date of the selection of the same by said scrip claimant. Said

O'Donnell and said Al Small were qualified under the Laws of the United States to hold and acquire land under the Homestead acts. That the accompanying Photo is a true picture from the North end of said building and improvements therein erected there by said all Small and acquired by said O'Donnell and said Thurston—and Beebe—and finally claimant. That I have measured the distance from the line upon the west side of J. W. Thurston's land and that said building and improvements is approximately 40 rods in distant from the land of said Thurston and thoroughly (?) understood was and is upon said land of claimant aforesaid—which was transferred and acquired by said Peter Beebe my predecessor as aforesaid.

That said land was acquired by All Small in the year of 1901 occupied by him until the month of March, 1902, when he disposed of the same to *said Dan O'Donnell he occupied the same until the Fall of 1906 when said O'Donnell disposed of the same to Thurston. Then said Thurston at about said time as affiant believes transferred the same to Beebe who held the same until September, 1909, when he disposed of the same including said O'Donnell improvements to this affiant* affiant continuously since said time with his family resided upon said land. These facts and circumstances I made known and informed my counsell and attorney in this cause and as indicated in your decision if they were not properly placed in the Record affiant is not in Fault hence this affidavit.

ALBERT R. MCPHEE.

Subscribed and sworn to before me this 18th day of April, 1911.

H. J. STRICKFADEN,
Notary Public in and for the State of Washington,
Residing at Maple Falls. [51]

DEPARTMENT OF INTERIOR.

WASHINGTON, D. C.

Seattle "F" 01723.

E—4436.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

AFFIDAVIT OF J. H. CANNON.

State of Washington,
County of Whatcom,—ss.

I, J. H. Cannon, first after being duly sworn, say: that I have examined the premises herein in controversy and the facts in said cause and I believe from said inspection that said applicant's cause and Motion is a meritorious one and that said application for a review is not made for delay.

J. H. CANNON.

Subscribed and sworn to before me this 19th day of April, 1911.

[Seal] H. J. STRICKFADEN,
Notary Public in and for the State of Wash-
ington, Residing at Maple Falls. [52]

Maple Falls, Washington, June 24th, 1912.

Hon. Commissioner,

General Land Office,

Washington, D. C.

Sir:

I have the honor to refer to Homestead application for the W.1/2 NW.1/4 and W.1/2 SW.1/4, Sec. 12, Tp. 39 N., R. 6 E. W. M.

My application was suspended by the local office on account as alleged of application to scrip by Gt. N. R. R. Co.

I forwarded direct to you evidence showing prior settlement by myself and also by Peter Beebe and old soldier whose relinquishment I purchased for a valuable consideration. I have resided and *and* am now residing on my homestead with myself and wife and three children. Special Agent Dave of the Forest Department visited my place *a* stayed a day or two with me, he stated that my improvements and residence was first class.

I would be very much pleased if I could get an early entry on my homestead and hope that you may allow the said at the earliest time compatible with the rules and regulations.

Yours truly,

ALBERT R. MCPHEE. [53]

Seattle, Washington, May 19, 1914.

Honorable Commissioner,
General Land Office,
Washington, D. C.

Sir:

I enclose herewith my authority to make inquiry concerning the following matter:

Albert R. McPhee of Whatcom County, Washington, on Sept. 27th, 1909, made Homestead application at the Seattle, Wash., District Land Office for W. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Tp. 39, N., R. 6 E. W. M. tending the fees upon same, and his application is now Seattle Ser. No. 01723.

The serial book in the Seattle Land Office discloses the fact that this homestead application was rejected for conflict with a certain lieu land selection made by the St. Paul, Minneapolis & Monitoba Railway Company long prior to said homestead application and that subsequent to Sept. 28, 1909, the date of the rejection of Mr. McPhee's homestead application, he appealed to the Hon. Commissioner of the General Land Office, furnishing showing as to prior occupancy or claim by former homestead settlers, and subsequently went to the office of the Hon. Secretary of the Interior on appeal from the rejection by your office sustaining the local land office, and that your office by its letter "F" of Jan. 11, 1911, transmitted departmental decision adverse to Mr. McPhee. The local serial book also discloses that notice of this decision was sent Mr. McPhee March 22, 1911, and subsequent to said last named date, to wit, July 10, 1911, the local office reported

to you that no action had been taken by Mr. McPhee.

The records here disclose no further action but Mr. McPhee still insists that he is an applicant thereto, and has some papers or documents before the department on which he is seeking to base a hearing. My employment consists only in ascertaining, if I can, from your office whether this matter is finally closed against [54] Mr. McPhee or whether there is still pending there a complaint or affidavits filed by Mr. McPhee which will enable him to get a hearing before the local land office as to the occupancy of the land involved at the time of selection by the St. Paul, Minneapolis & Manitoba Railway Company.

Will you kindly advise me thereof?

Yours truly,
JOS. W. GREGORY. [55]

GENERAL LAND OFFICE,
WASHINGTON.

June 5, 1914.

ALBERT R. MCPHEE

vs.

ST. PAUL, M. & M. RY. CO.

ADVICE AS TO STATUS OF WITHIN DE-
SCRIBED CLAIM.

Mr. Joseph W. Gregory,
Central Building,
Seattle, Wash.

My dear sir:

I am in receipt of your letter of May 9, 1914,

transmitting a letter dated May 14, 1914, addressed to you from Mr. Albert McPhee, Glacier, Wash., relative to his application 01723, to make homestead entry for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Township 39 N., R. 6 E., Seattle, Washington, Land District.

In response you are advised that the record in said homestead application was transmitted to the Secretary of the Interior May 17, 1911, on a motion for review of departmental decision dated December 8, 1910, which affirmed the decision of this office of May 10th, 1910, rejecting said Homestead application. The matter is still pending before the Interior Department.

Your letter, together with the letter of Mr. McPhee, has been transmitted to the department for consideration,

Very respectfully,

_____ ,

Commissioner. [56]

(Copy.)

DEPARTMENT OF THE INTERIOR,
WASHINGTON.

November 18, 1914.

“F”

Seattle, 01723

Motion Denied.

ALBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY CO.

MOTION FOR REHEARING.

Motion for rehearing has been filed by Albert R. McPhee of departmental decision of December 8, 1910, which affirmed a decision of the Commissioner of the General Land Office, dated May 7, 1910, rejecting McPhee's application to make home-stead entry for the W.1/2 NW.1/4 and NW.1/4 SW.1/4, Sec. 17, T. 39 N., R. 6 E., Seattle, Washington, land district.

On full consideration of the entire matter, the department finds no reason for reversing or modifying the conclusion heretofore reached in this case, and the motion is denied.

(Signed) A. A. JONES,
First Assistant Secretary. [57]

(Copy.)

No. 19,584.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON.

January 15, 1915.

Decision "F" of May 7, 1910, Declared Final,
and Homestead Application 01723 Fi-
nally Rejected. Case Closed.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA RY.
CO.

Register and Receiver,
Seattle, Washington.

Sirs:

On November 18, 1914, the First Assistant Secretary of the Interior denied a motion for rehearing of departmental decision dated December 8, 1910, which affirmed the decision of this office dated May 7, 1910, holding for rejection Albert R. McPhee's application 01723 to make homestead entry for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., for conflict with lieu selection No. 44, made May 9, 1902, by the St. Paul, Minneapolis and Manitoba Railway Company under act of August 5, 1892 (27 Stat. 390), and on December 3, 1914, the record in the above entitled case was re-

turned to this office with the statement that the decision of the Department herein referred to had become final.

Accordingly, decision "F" of May 7, 1910, is hereby declared final, and homestead application 01723 by Albert R. McPhee will stand rejected.

Two copies of departmental decision of November 18, 1914, are herewith inclosed for your use and the files of your office. [58]

No. 19,584, p. 2.

You will notify Thomas R. Benton, St. Paul, Minnesota, attorney for the St. Paul, Minneapolis and Manitoba Railway Company.

Very respectfully,

C. M. BRUCE,

Assistant Commissioner. [59]

Glacier, Wash., May 26, 1915.

Hon. W. J. Bryan,

Sec'y of State,

Washington, D. C.

Honorable Sir:

In the year of Nineteen Hundred Nine (1909) I, Elbert R. McPhee took up a homestead in the state of Washington, County of Whatcom, and have lived from then to date with my wife and three children on said homestead. I have a large amount of land cleared, have forty-eight fruit trees two thousand eight hundred strawberry plants besides a truck patch. The land was occupied by a settler long before said land was placed under script.

Now Mr. Lane of the Dept. of the Interior (in the Ritchie case he having took up a homestead)

gave him his patent upon his finding coal, where in two cases of the same nature he (Mr. Lane) reversed them.

Now Mr. Bryan my case with the Department is (Seattle 01723) and as there are several persons in the same predicament in this locality I write you in regard as to why for one reason can the Railroads hold these large tracts of land without paying taxes. The only thing we want is a fair deal and could you Mr. Bryan give us somewhat of an idea of what to do.

Yours truly,

ELBERT MCPHEE. [60]

GENERAL LAND OFFICE,
WASHINGTON.

June 14, 1915.

Mr. Albert R. McPhee,
Glacier, Washington.

My dear Sir:

I am in receipt of your letter dated May 26, 1916, addressed to Hon. W. J. Bryan, then Secretary of State, referred to the Department of the Interior by the State Department, June 9, 1915, with the statement that you were so advised.

In response you are advised, and in fact you are doubtless aware, that on November 18, 1914, the First Assistant Secretary of the Interior denied a motion for rehearing filed on your behalf, of departmental decision dated December 8, 1910, which affirmed the decision of this office of May 7, 1910, holding for rejection your application 01723 filed

September 27, 1909, to make homestead entry for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., Seattle, Washington, land district, for conflict with lieu selection No. 44, made May 9, 1902, by the St. Paul, Minneapolis and Manitoba Railway Company under Act of August 5, 1892 (27 Stat. 390). The decision of the Department dated November 18, 1914, concluded with this statement:

“On full consideration of the entire matter the Department finds no reason for reversing or modifying the conclusions heretofore reached in this case, and the motion is denied.”

On December 3, 1914, the record in your claim was returned to this office with the statement that the decision of the Department herein referred to had become final.

Accordingly, by letter “F” of January 15, 1915, decision “F” of May 7, 1910, addressed to the Register and Receiver at Seattle, Washington, was declared final, and your homestead application 01723 rejected. This office is unable to afford any relief in the premises.

Very respectfully,
C. M. BRUCE,
Assistant Commissioner. [61]

December 3-0, 1915.

01723, Seattle, Washington.

Honorable Commissioner
of the General Land Office.

Sir:

Referring to the case of Albert McPhee vs. St. Paul, Minneapolis and Manitoba Ry. Company. I

am advised by the local attorney for Mr. McPhee that steps will be taken to apply for a reopening of this case in the comparatively near future. Accordingly it is requested by them that your Office be advised to the end that no steps be taken by you looking toward the issuance of patent to the railway company on the land involved, namely the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NR. $\frac{1}{4}$ SW. $\frac{1}{4}$, of Sec. 12, T. 39 N., R. 6 E., covered by said company's list No. 4. Will you not kindly see that this is done and notation made on the list.

Very respectfully yours,

SAMUEL T. HERRICK,
Attorney for A. R. McPhee.

I also enter appearance for McPhee and request notice of all action. [62]

April 4, 1916.

01723.

Seattle, Washington.

Honorable Commissioner
of the General Land Office.

Sir:

This is to advise you that I have this day filed in the Department a petition for supervisory authority in the case of Albert R. McPhee vs. St. Paul, Minneapolis and Manitoba Ry. Co., involving the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Section 12, T. 39 N., R. 6 E., Seattle Land District, Washington. Accordingly I renew my previous request that no action be taken looking toward the issuance of patent on the Railway selection of said land,

namely, list 4, dated May 9, 1902, and adjusted to the improved survey on February 23, 1907.

Very respectfully,

SAMUEL HERRICK,

Attorney for Albert R. McPhee. [63]

April 10, 1916.

E—4436.

D—13,396.

Honorable Secretary of the Interior,
Washington, D. C.

Sir:

Referring to petition for the exercise of supervisory authority which I filed a couple of days ago in the case of Albert R. McPhee vs. St. Paul Minneapolis & Manitoba Ry. Co., I advise that careful examination of the record in the case of John Thurston vs. St. Paul Minneapolis & Manitoba Ry. Co. (E—2630, Serial 01662, Seattle) shows the probable reason for the mistake which occurred in these two cases.

The land involved in Thurston's claim, and on which hearing was ordered by the Department on March 19, 1910, and on which final certificate and patent subsequently issued to him, was the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of section 1, and the E. $\frac{1}{2}$ NW. $\frac{3}{4}$ of section 12, and the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of section 12, T. 39, R. 6. Yet at the hearing the three witnesses who probably knew the most about these improvements, namely, John R. Smith, Al Small, and Dan O'Donnell, (the latter two of whom had owned them successively) were interrogated by Thurston's attorney as to the

existence of such improvements on "The N. $\frac{1}{2}$ NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Section 12." In other words, the attorney either wittingly or unwittingly described part of the land actually embraced in the claim of McPhee, and the witnesses thereupon glibly described the improvements, though without specifying on which forty acre tract they were found. Only one of the witnesses appears to have been questioned as to the exact forty acres on which the improvements were located, and he replied he did not know.

The attorney for the Railway Company did not cross-examine any of these witnesses, and did not point out in his appeal the fact that they were testifying as to land not involved in that case. [64] Apparently the Examiner in the General Land Office failed to note the discrepancy also, and there was no appeal from the General Land Office to your Department, where the error could and probably would have been discovered and corrected.

It is true that the other three witnesses, including Thurston himself, merely testified as to the land included in Thurston's claim, but this may have arisen through ignorance on the part of two of them, and through a fraudulent intent on the part of Thurston. The fact remains that the two men who had owned the improvements, namely, Small and O'Donnell, described them as being in a tract, part of which is included in McPhee's claim. Consequently according to the testimony of three out of the six witnesses improvements might well have been located

on McPhee's land, just as we now claim they actually were.

Whether the mistake in question by the attorney and witnesses was made knowingly or not, we cannot say, but it is evident that the adjudication of the case in favor of Thurston, and the subsequent patenting of the land to him, are based either on a mistake in material facts, or upon actual fraudulent intent; also that it was based on carelessness in the General Land Office in failing to note the discrepancy in the description of the land involved. There was certainly such a state of facts as warrants your Department in now reopening both cases and restoring the Thurston land to the Railroad Company, and conferring upon McPhee the land which he or his predecessors in interest actually improved prior to the railroad selection.

Respectfully submitted,
SAMUEL HERRICK,
KELLOGG & THOMPSON,
Attorneys for Albert R. McPhee. [65]

BEFORE THE HONORABLE SECRETARY OF
THE INTERIOR.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY CO.

Involving Serial 01723

Seattle, Washington.

D—4436.

E—13396.

Comes now Albert R. McPhee, by his attorneys, and respectfully petitions the Honorable Secretary for the exercise of his supervisory authority in the above entitled cause, assigning as grounds therefor the following errors in the Departmental decisions of December 8, 1910, and November 18, 1914, to wit:

I.

ERROR in holding “there is no evidence in the record of these successive assignments, nor allegations of the time when they were made—if any were made,”—these findings being incorrect at least as of the time when the motion for rehearing was denied.

II.

ERROR in deciding “for all that appears in the record, the alleged former settlers merely abandoned their rights, and McPhee’s claim of right appears to have been initiated merely by him as an original settlement”—this finding being also incor-

rect as of the date of the denial of the motion for rehearing, at least.

III.

ERROR not to find that the improvements upon this land were located thereon in good faith prior to the date of the railroad selection.

IV.

ERROR in not holding that said improvements were sold by Al Small to Dan O'Donnell in March, 1902, and by O'Donnell later to Thurston, then to Beebe, and finally to McPhee, each of these parties paying for them in turn.

V.

ERROR in apparently giving no consideration to the full showing made by plaintiff on the motion for rehearing, although such showing [66] was suggested and required by the Department's decision on appeal, and a strong *hist* was therein given that if such showing were made said decision would be changed.

VI.

ERROR in not following the Department's decision in *Leete vs. Northern Pacific Ry. Co.*, and *Frank vs. Northern Pacific Ry. Co.* (37 L. D. 37, 193, 502), holding that a settlement on a tract of unsurveyed land at the time of its selection under a railroad grant would defeat that selection, though the settler did not continue to maintain his claim, but sold out to another.

VII.

ERROR in for any reason rejecting McPhee's homestead application.

VIII.

ERROR in for any reason sustaining the railway company's selection.

BRIEF IN SUPPORT OF PETITION.

The land herein involved, to wit: the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, section 12, T. 39 N., R. 6 E., Seattle, Washington, was selected on May 9, 1902, by the St. Paul, Minneapolis and Manitoba Ry. Co., under the act of August 5, 1892 (27 Stat. 390) while still unsurveyed. After survey said selection was adjusted, and on April 27, 1909, McPhee filed homestead application. Same was successively rejected by the local land office, the General Land Office, and the Department, the decision of the latter being rendered on December 8, 1910.

In said decision the Department thus ruled: "McPhee asserts that he is assignee of the rights of a former settler, whom he names in his appeal from the local office as Peter Beebe and in his appeal from the Commissioner of the General Land Office as Al Small, both of whom he says were successors of Dan O'Donnell, who in September, 1896, went upon and claimed said lands as a homestead and improved them prior to the survey and long prior to any rights on part of [67] the Railway Company. McPhee claims to have purchased this settlement right on September 27, 1909. There is no evidence in the record of these successive assignments, nor allegations of the time when they were made. For all *the* appears in the record the alleged former settlers merely abandoned their rights and McPhee's claim of right appears to have been

initiated merely by him as an original settlement.”

Motion for rehearing of this decision was seasonably filed, accompanied by the affidavits of J. H. Cannon, Fred Benson, Peter Beebe, H. E. Leavitt, and Albert R. McPhee, showing the facts as to the improvements and their successive sale to Beebe et al., and finally to McPhee.

On November 18, 1914, this motion was denied by the Department in a short decision, and the case was finally closed adverse to McPhee on January 15, 1915. Patent has not yet issued to the railway company, however, and the matter is therefore still within the jurisdiction of the Department.

It is evident from the fact *that the said motion for rehearing was pending before your Department for nearly four years*, that the motion was not only very carefully considered, but that likewise there was a strong disposition to allow the same: for otherwise the motion would probably have been denied in the usual course within a month or two. An appeal or motion does not pend before the Department for a long series of years without some good reason existing, that is, either considerable doubt in the mind of the Department as to the correct disposition of that case, or its being involved in a series of cases in which the Department desired to lay down some general rule. It does not appear that the instant case was one of such a group, and accordingly we must infer that the Department had grave doubts as to whether the motion should be denied or should be allowed. This doubt was finally determined in favor of denial, but we submit that

the proper course would have been to allow it, and believe that with more mature consideration such course will be followed. [68] Accordingly the present petition is filed.

There can be no doubt that the Department suggested in its decision, and meant to suggest, that if Mr. McPhee could show the improvements on the land were successively assigned for a valuable consideration, and finally bought by McPhee for such consideration, he would be allowed to prevail under the decisions in the Leete and Frank cases (*supra*) upon which he relied on his appeal upon making such showing, and we submit that the Department should have granted the motion, and cannot understand its failure to do so.

Such failure may possibly have been due to the fact that these same improvements appear to have been claimed by John W. Thurston, as existing on his land adjoining that in controversy, and to have been held by the Department in its decision of March 19, 1910, in the case of said Thurston vs. St. Paul, Minneapolis and Manitoba Ry. Co. (E—2360) to have excepted that land from the railway selection. If that actually be the reason for the Department's denial of the said motion, we submit that it is an erroneous one, as if a mistake were made in the Thurston case it should be rectified by a re-adjudication of that case, and a reinstatement of the railway selection therein—not by punishing an innocent party who had nothing to do with the Thurston case, and whose valuable rights should not be forfeited because of a mistake committed in an-

other case, or possibly because of deception upon the Department in that other case by persons with whom he had nothing to do.

It seems that on the Thurston land final certificate 01662 issued on January 24, 1913, and patent followed not long thereafter. However, the Statute of Limitations on a suit by the Government to set aside said patent has not yet expired, and if the Department believes that deception was practiced, we submit that such suit should be brought, and the land restored to the jurisdiction of the Department so that the railway selection therein could be sustained. Certainly it is not right in the absence of any such action to deny to McPhee the benefit of the improvements actually existing on his own land and paid for by him. [69]

The affidavit of Fred Benson submitted in this case on the motion for rehearing showed that he had known the land here in controversy for six years prior thereto, and particularly the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, upon which were the improvements of Dan O'Donnell. That affiant had had considerable experience as a photographer, and the accompanying photograph is a true representation of said improvements, and of McPhee and family, though at the time of the affidavit McPhee had erected another house on the land, and resided in that.

In his affidavit, Peter Beebe deposed that he had purchased the improvements for \$50.00 and on September 26, 1909, sold them to McPhee for \$50, since which time McPhee had resided continuously on that land with his family.

H. E. Leavitt swore in his affidavit that he had known the land (the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$) for the previous ten years. That the accompanying picture is a true representation of the Dan O'Donnell cabin upon the South forty, *and that said cabin has been at all times on said land since the fall of 1901.* That in April, 1902, affiant saw O'Donnell occupying said cabin as a home.

Albert R. McPhee stated in his affidavit that at all times since occupying said land he has tried to hold it as a homesteader under the U. S. Land Laws. That in September, 1909, he purchased for \$50 the improvements on the claim, and since lived there continuously with his family. Such improvements consisted of a small amount of clearing, a trail, and a log building 16x24 feet, with floor, windows and door. That the said cabin had been used and resided in by Al Small and Dan O'Donnell, then Beebe had acquired same from one Thurston. That upon measurement affiant found these improvements to be 40 rods distant from the land of said Thurston. Said improvements passed from Al Small to Dan O'Donnell, and thence to Thurston, thence to Beebe, and finally to affiant.

The affidavit of J. H. Cannon, accompanying the motion, showed that he himself had examined the premises in controversy, also the facts in the case, and believe that McPhee's cause was a meritorious [70] one. In his brief accompanying the motion Mr. Cannon suggested that if the Department had any doubt as to the location of the improvements,

then an inspector or field officer should be sent out, as applicant had no fear of the results.

It is respectfully submitted that this showing fully met the implied requirements of the Department's decision on appeal, and should have resulted in a vacation of that decision, and an awarding of the land to McPhee. Certainly they brought him fully within the Departmental decisions in the Leete and Frank cases, which were in turn based upon the U. S. Supreme Court decision in the case of St. Paul, Minneapolis and Manitoba Ry. Co. vs. Donohue (210 U. S. 21) in which it was held that *"if a bona fide settlement claim had attached to these lands, and was subsisting at the date of the company's proffered selection thereof, the selections cannot stand. It is immaterial that the settlement may have been subsequently abandoned."*

Surely, the Department does not in the present case wish to set aside its previous reported decisions in the cases above mentioned, nor to defy the ruling of the U. S. Supreme Court in the Donohue case. We apprehend upon the contrary that the sole reason for the denial of the motion for rehearing filed by Mr. McPhee's former attorney was the circumstance that it claimed certain improvements previously adjudged by the Department to have been located upon another claim, and to have been the property of another man. If that be the case we must urge again that this is a manifest injustice to the present claimant who, to the best of our knowledge, was not concerned in nor connected with the Thurston case, and who was not in any

way at fault for the determination that the disputed improvements were upon the Thurston land, and were the property of Thurston. If one claimant acting in good faith is to be punished for fraud and wrong doing of another claimant, merely because that other happens to be on adjoining land, and because his case happens to come before the Department first, then we urge that the rights of any settler on the public domain are in jeopardy. And if the Department in two [71] cases involving lands lying side by side, and involving facts practically identical, renders diametrically opposite decisions, then the confidence of these unlearned in the law in the *quasi*-judicial powers and functions of the Interior Department will be somewhat shaken.

We believe, however, that the Department must have misunderstood some of the facts in this case, and that upon a more mature consideration thereof the previous decisions will be vacated, and the homestead application allowed even though it becomes necessary to file suit in the courts to set aside the patent issued to Thurston.

With a prayer that such action be taken, this case is

Respectfully submitted,
SAMUEL HERRICK,
KELLOGG & THOMPSON,
Attorneys for Albert R. McPhee. [72]

BEFORE THE HONORABLE SECRETARY OF
THE INTERIOR.

Involving Serial 01723
Seattle, Washington.

ALBERT (not ELBERT) R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY COMPANY.

D—13396.

Comes now Albert (not Elbert, as stated in the various decisions) R. McPhee, by his attorneys, and respectfully moves the Honorable Secretary a second time for the exercise of his supervisory authority in the above-entitled matter, assigning as grounds therefor the following errors in the Department's decision of April 18, 1916, to wit:

I.

ERROR in finding as a fact of importance in the case that McPhee "failed to file any protest against the allowance of Thurston's entry, final proof, or the issuance of patent thereon"; at least in the absence of any showing that McPhee knew or should have known of the circumstance that Thurston claimed by reason of a settlement made upon part of the land embraced in McPhee's claims.

II.

ERROR in holding that McPhee's delay for a year since final decision of the Department before filing his first petition for the exercise of supervisory authority could prevent him from securing

relief against the fraud which had been perpetrated against him, against the United States, and against the Great Northern Railway Company.

III.

ERROR in considering and adjudicating McPhee's claim as based upon privity in contract with rights of O'Donnell. As a matter of fact McPhee claimed from Beebe, who had purchased from John W. Thurston the latter's rights in the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Section 12. [73]

IV.

ERROR in for any reason declining to take steps to right the wrong which has been done in this case, and to punish the fraud which has been committed therein.

And as further grounds petitioner filed herewith, and prays to be taken as a part hereof, the affidavits of Peter Beebe, E. M. Magner, Al Small, Fred Benson, Dan O'Donnell, Albert R. McPhee, and H. C. Thompson.

The two affiants last named explain the cause of the delay which transpired in the matter of filing the first petition for supervisory authority in this case. - It is that he never received notice of the decision of the Department denying his motion for rehearing until the month of January, 1915; that he was then advised by his attorney residing in Maple Falls, Washington, that said attorney could do nothing further for him; that affiant then went to the City of Seattle, and consulted two attorneys regarding the case, but as they both required a

cash retainer fee of \$100 before proceeding to represent him, and as he was unable to raise that sum of money, he returned to his home at Glacier, Washington, and went to work as a common day laborer in order to secure sufficient funds with which to employ an attorney; that about the 15th of August he consulted H. E. Thompson, Esq., of Bellingham, Washington, and made arrangements with the latter's firm for representation of him. Mr. Thompson shows that about the middle of August he wrote a letter to a certain attorney in Washington requesting the latter's employment in this case, and did not learn from said attorney until a month and a half later that he would not care to undertake such employment; affiant then immediately began to seek some other attorney, and in the month of December entered into negotiations with the writer of this brief, resulting in the making of arrangements in the month of January, but that delay of thirty or sixty days was occasioned after that date because of the fact that it was necessary for McPhee to raise the sum of \$50, which he did as soon as possible. [74]

It is earnestly submitted that these two affidavits fully explained the delay which occurred in this case, and proved that there were no laches or negligence on the part of Mr. McPhee. A common day laborer, living in a small town in the State of Washington more than three thousand miles from the seat of Government, whose own attorney refuses to proceed further in the case, and who makes an unavailing trip to the principal city of his own State in an effort to get other attorneys, but failed;

who then goes to work to earn money with which to employ someone else, and finally secures a firm of attorneys in another city, which firm is delayed for several months in employing an associate in this city—it is easy to be perceived that the claimant is not to be censured for the delay, but that he has used all due diligence. The case would be quite different were he a man of means, or a man of much education, or one living in a land office town, or in the capital city of the Nation.

Coming now to the merits of the case, we find that the Department holds against McPhee partially for the reason that the adjudication in favor of Thurston by the Department was “without objection from McPhee.” McPhee’s affidavit filed herewith, however, shows that he never had any knowledge or information until December, 1914, leading him to believe that John W. Thurston was using the improvements located on affiant’s land in making his proof; that Thurston had never asserted any claim of any kind or character to any land in the W.1½ of the W.1½ of Section 12, and affiant therefore paid no attention to any hearing had by said Thurston at the Land Office at Seattle, nor was he notified of any such hearing, nor that any of affiant’s rights were prejudiced by reason of any proofs made therein.

This satisfactorily answers one of the Department’s objections. Another one is that “no affidavit by O’Donnell has been filed by McPhee.” In response to that we have secured and file herewith the affidavit of O’Donnell showing his connection

with this land from the time of his purchase from C. C. Cole, in October, 1901, until his transfer to Thurston in the spring of 1906, each of these transactions [75] being for a consideration of \$100; also "that it was the understanding of affiant that when he transferred his rights in land to one John W. Thurston that he transferred the same rights and the same improvements which he had theretofore purchased from said C. C. Cole."

The affidavit of Peter Beebe, filed herewith, shows that in November, 1906, he entered into an exchange agreement with Thurston whereby he released to Thurston the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Section 1, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12, and in consideration of which Thurston relinquished and transferred to Beebe all of his rights to the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Section 12, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Section 12; that at that time a log cabin was located upon the said SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Section 12; that about September 20, 1909, affiant released said lands and all the improvements thereon to Albert R. McPhee for the sum of \$50 cash; that McPhee thereupon immediately went upon said land with his family, took up his residence, and made other improvements on it. "That affiant has been well acquainted with the location and character of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 1, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Section 12, for ten years last past; *that affiant knows of his own personal knowledge that there were no improvements of any kind, character, or description upon any of said land last described prior to August,*

1906; said land last described being the land upon which patent was issued April 29, 1913, to John W. Thurston.''

This affidavit of Beebe is fully corroborated by E. M. Magner, who was present at the time of the transfer from Beebe, to McPhee, knows about the improvements erected on that land, and also knows as to the lack of any improvements prior to January 1, 1906, on the land patented to John W. Thurston.

Al Small, who was one of the witnesses for Thurston at the hearing between the latter and the St. Paul, Minneapolis and Manitoba Railway Company, shows that the improvements in question were located upon the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and that to Small's personal knowledge there were no improvements on the land subsequently patented to Thurston [76] prior to the time of Thurston's making some about the year 1906.

A similar affidavit is supplied by Fred Benson.

It is earnestly submitted that this constitutes a very strong showing for the petitioner, and *on* which both justifies and requires a reopening of this case. It is evident from a consideration of the Department's last opinion that it labored under a misunderstanding as to the facts of this matter, namely, that McPhee was claiming some privity with O'Donnell. As a matter of fact McPhee does not claim from O'Donnell except that O'Donnell transferred to Thurston, Thurston to Beebe, and Beebe to McPhee. We believe that in our previous motion we did not make it clear that Thurston at one

time claimed the land on which the improvements were made by reason of the assignment from O'Donnell, but by a subsequent transaction Peter Beebe, and later Albert McPhee succeeded to all his rights and interests in said land, and the improvements thereon. Had Thurston not disposed of his claim to land in the W. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of section 12, the adjudication in his favor would have been correct, but having made such disposition the decision in his favor was absolutely erroneous since it resulted in the issuance of patent to him for land in section 1, and in the E. $\frac{1}{2}$ of section 12, by reason of improvements located prior to 1906 on the W. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of section 12.

Under these circumstances the adjudication in favor of Thurston was entirely erroneous, and amounts to a fraud upon the rights of McPhee.

In our letter to your office of April 10, 1916, in support of the first petition for the exercise of supervisory authority, we invited your attention to the probable reason for the mistake which occurred in the two cases.

The land involved in Thurston's claim, and on which hearing was ordered by the Department on March 19, 1910, and on which final certificate and patent subsequently issued to him, was the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of section 1, and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of section 12, and the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of section 12, T. 39 N. R. 6. Yet at the hearing the three witnesses who probably [77] knew the most about these improvements, namely, John E. Smith, Al Small, and Dan O'Donnell (the latter two of whom had owned them

successively), were interrogated by Thurston's as to the existence of such improvements on "The N. $\frac{1}{2}$ NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of section 12," in other words, the attorney either wittingly or unwittingly described part of the land actually embraced in the claim of McPhee, and the witnesses thereupon glibly described the improvements, though without specifying on which forty acre tract they were found. Only one of the witnesses appears to have been questioned as to the exact forty acres on which the improvements were located, and he replied that he did not know.

The attorney for the Railway Company did not cross-examine any of these witnesses, and did not point out in his appeal the fact that they were testifying as to land not involved in that case. Apparently the Examiner in the General Land Office failed to note the discrepancy also, and there was no appeal from the General Land Office to your Department, where the error could and probably would have been discovered and corrected.

It is true that the other three witnesses, including Thurston, himself, merely testified as to the land included in Thurston's claim, but this may have arisen through ignorance on the part of two of them, and through a fraudulent intent on the part of Thurston. The fact remains that two *two* men who had owned the improvements, namely, Small and O'Donnell, described them as being in a tract, part of which is included in McPhee's claim. Consequently according to the testimony of three out of the six witnesses improvements might well

have been located on McPhee's land, just as we now claim they actually were.

Whether the mistake in question by the attorney and witnesses was made knowingly or not, we cannot say, but it is evident that the adjudication of the case in favor of Thurston, and the subsequent patenting of the land to him, are based either on a mistake in material facts, or upon actual fraudulent intent; also that it was [78] based on carelessness in the General Land Office in failing to note the discrepancy in the description of the land involved. There was certainly such a state of facts as warrants your Department in now reopening both cases and restoring the Thurston land to the Railroad Company and conferring upon McPhee the land which he or his predecessors in interest actually improved prior to the railroad selection.

We again call your attention to the fact that motion for rehearing of the Department's decision of December 8, 1910, *was pending before your office for nearly four years* before it was finally adjudicated in favor of the railroad company. From this it is manifest that the motion was not very carefully considered, but that likewise there was a strong disposition to allow the same; for otherwise the motion would probably have been denied in the usual course within a month or two. An appeal or a motion does not pend before the Department for a long series of years without some good reason existing, that is, either considerable doubt in the mind of the department as to the correct disposition of that case, or its being involved in a series of cases

in which the Department desired to lay down some general rule. It does not appear that the instant case was one of such a group, and accordingly we must infer that the Department had grave doubts as to whether the motion should be denied or should be allowed. This doubt was finally determined in favor of denial, but we submit that the proper course would have been to allow it, and believe that with more mature consideration such course will be followed. Accordingly the present petition was filed.

There can be no doubt that the Department suggested in its first decision, and meant to suggest, that if Mr. McPhee could show the improvements on the land were successively assigned for a valuable consideration, and finally bought by McPhee for such consideration, he would be allowed to prevail under the decisions in the Leete and Frank cases (*supra*) upon which he relied on his appeal upon making such showing, and we submit that the Department should have granted the motion, and cannot understand its failure to do so. [79]

Surely, after the Department had the case under consideration for about four years before rendering its decision, and was in grave doubt during all that time as to the proper disposition of it, or else had possibly pigeon-holed the case through carelessness of some official or some clerk, it is in no position to object at the present time to delay on the part of McPhee of one year, or one-fourth of the time aforesaid. If four years be no unreasonable time for a great Department, equipped with a large staff

of able officials, and learned lawyers, surely one year is not unreasonable for a poor common day laborer in the back woods of the State of Washington, three thousand miles distant from the seat of Government, having one lawyer who refused to go ahead with his case, successively applying to two others who turned him down, thence seeking the services of a practitioner in the District of Columbia, who also, after some delay, refused to take the case. We do not mean to criticise the Department for the delay of four years in the adjudication of the case, as there probably was an excellent reason for that, namely, a doubt in the minds of the officials as to how the case should be decided; but we do say that since the Department is in no way blameworthy for that delay, so the claimant should not be censured for the delay of about one-fourth of that time, especially in view of the reasons he now shows as to his inability to get an attorney who would promptly take the matter up for him, and as to his own financial circumstances and station in life.

The affidavits now filed, together with those previously placed on file, show conclusively that a mistake was made in the issuance of patent to John W. Thurston upon land adjoining that here in controversy. That mistake should *not* be rectified by a readjudication of the case, and a reinstatement of the railroad selection therein—not by punishing an innocent party who had nothing to do with the Thurston case, and whose valuable rights should not be forfeited because of a mistake committed in another case, or possibly because of deception prac-

ticed upon the Department in that other case [80] by persons with whom he had nothing to do.

In conclusion we refer again to the affidavits of Benson, Beebe, Leavitt, McPhee, and Cannon, filed in connection with the motion for rehearing, and to which we invite particular attention in the first petition for the exercise of supervisory authority.

It is respectfully submitted that that showing, together with what is now made, completely answers every objection raised by the Department in its three decisions in this case, namely, the decision on appeal, the decision on motion for rehearing, and the decision on the first petition for the exercise of supervisory authority. Certainly they bring Mr. McPhee fully within the Departmental decisions in the Lette and Frank cases, which were in turn based upon the U. S. Supreme Court decision in the case of St. Paul, Minneapolis and Manitoba Ry. Co. vs. Donohue (210 U. S. 21), in which it was held that *“if a bone fide settlement claim had attached to these lands, and was subsisting at the date of the company’s proffered selection thereof, the selections cannot stand. It is immaterial that the settlement may have been subsequently abandoned.”*

Surely, the Department does not in the present case wish to set aside its previously reported decisions in the cases above mentioned, nor to defy the ruling of the U. S. Supreme Court in the Donohue case. We apprehend upon the contrary that the sole reason for the denial of the motion for rehearing filed by Mr. McPhee’s former attorney was the

circumstance that it claimed certain improvements previously adjudged by the Department to have been located upon another claim, and to have been the property of another man. If that be the case we must urge again that this is a manifest injustice to the present claimant who, to the best of our knowledge, was not concerned in or connected with the Thurston case, and who was not in any way at fault for the determination that the disputed improvements were upon the Thurston land, and were the property of Thurston. If one claimant acting in good faith is to be punished for fraud and wrong doing of another claimant, merely because that other happens to be on adjoining land, and because his case happens to come before the Department first, [81] then we urge that the rights of any settler on the public domain are in jeopardy. And if the Department in two cases involving lands lying side by side, and involving facts practically identical, renders diametrically opposite decisions, then the confidence of those unlearned in the law in the *quasi-judicial* powers and functions of the Interior Department will be somewhat shaken.

We believe, however, that in view of the showing now made, which answers fully every objection raised in the last Departmental decision, the previous decisions will be vacated, and the homestead application allowed—even though it becomes necessary to file suit in the courts to set aside the patent issued to Thurston. That is, however, a matter with which we are not concerned, as such suit would result for the benefit of the railway company which

is now profiting by the mistake made, at least so far as the rights of Mr. McPhee are concerned.

All of which is again prayerfully and respectfully submitted.

SAMUEL HERRCK,
KELLOGG & THOMPSON,
Attorneys for Albert R. McPhee. [82]

DEPARTMENT OF THE INTERIOR,
WASHINGTON.

D—13396.

April 18, 1916.

“F”

Seattle 01723.

Homestead application rejected.

Denied.

ELBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY COMPANY.

PETITION FOR THE EXERCISE OF SUPER-
VISORY AUTHORITY.

April 8, 1916, Elbert R. McPhee filed a petition for the exercise of the Departmental supervisory authority in the matter of his homestead application No. 01723, filed September 27, 1909, at Seattle, Washington, for the W.1/2 NW.1/4, NW.1/4 SW.1/4, Sec. 12, T. 39 N., R. 6 E., W. M., which was ordered rejected by the Department's decisions of December 8, 1910, and November 18, 1914, for conflict with selection list No. 44 (Seattle 01653), filed

May 19, 1902, by the St. Paul, Minneapolis and Manitoba Railway Company under the act of August 5, 1892 (27 Stat. 390). McPhee's application was finally rejected and the case closed by the Commissioner of the General Land Office January 15, 1915.

No explanation is offered for the long delay in filing the petition and it might properly be denied upon that ground. However, the petitioner earnestly contends that the department's prior action was erroneous in view of certain affidavits filed April 21, 1911, in connection with a motion for review, and suggest that inasmuch as the land has not yet been patented to the railway company and is still within the jurisdiction of the land department the previous decisions be recalled and a hearing ordered to determine the rights of the parties.

At the time of the filing of the survey of the railway company's selection the land was unsurveyed. The plat of survey was filed in the local land office February 6, 19-7, and on February 23, 1907, the railway company described the same lands as conforming to the survey. [83]

The affidavit of McPhee alleges that the land applied for by him was, in 1901, embraced in the settlement of one Al. Small, who sold whatever rights he might have to Dan O'Donnell; that O'Donnell went into actual occupation of the land and was a settler thereon at the time of the filing of the railway company's list. O'Donnell later sold his improvements to John W. Thurston, it being further

alleged that O'Donnell's house or cabin was situated upon the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 12, as to which McPhee is corroborated by one Benson. The affidavit of Peter Beebe states that beginning in August, 1906, he claimed a settlement right upon the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 1, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 12. In November, 1906, however, in consideration of \$50 paid to him by Thurston he changed his claim to the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, which included the tract upon which O'Donnell's cabin was located. No affidavit by O'Donnell has been filed by McPhee.

The records of the Department disclose that upon February 6, 1907, John W. Thurston made homestead application No. 01662, for the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, which was rejected because of conflict with the railway company's selection as to all tracts except the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1. By departmental decision of March 19, 1910, a hearing was ordered to determine the rights between Thurston and the railway company. At this hearing Small testified that in 1910 he was employed to construct a cabin upon the land by C. C. Cole. Cole sold the cabin before its completion to Dan O'Donnell, who finished it and established residence therein prior to May 9, 1902. O'Donnell also posted a notice of his settlement, but the exact description of the land claimed by him does not appear. O'Donnell testified to his settlement upon the land claimed by Thurston and that he sold whatever rights he had to Thurston in the fall of 1906. Thurston testified that his

purchase from O'Donnell was upon October 22, 1906, and that he himself established residence in December, 1906. Thurston stated in his testimony:

Q. Now when did you take up your residence on the land? [84]

A. That same fall; being a quarter of a mile back from there I drops one forty and takes another forty, and I takes my improvements and puts them down on another forty. I didn't want to move my children and family up in the cabin, so I put up a cabin there.

This may, perhaps, refer to the transaction alleged in Beebe's affidavit. As the result of the hearing, Thurston's application was allowed August 23, 1911. He made final proof September 28, 1912, final certificate issuing January 24, 1913, and patent April 29, 1913.

February 6, 1907, Peter Beebe filed homestead application for the SW. $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 1, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 12, which was rejected by the register and received as to the lands in Sec. 12 for conflict with the railway selection. Upon appeal their action was affirmed by the Commissioner in a decision dated July 28, 1909, notice of which was served upon Beebe's attorney September 21, 1909. September 23, 1909, Beebe executed a relinquishment of the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, to the United States, stating therein that he has transferred "my right and goodwill to E. R. McPhee." The relinquishment which had been purchased by McPhee for the sum of \$50 was filed September 27, 1909, concurrently with his

homestead application. Beebe's application was allowed as to the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, August 21, 1909 (H. E. 01692), upon which patent was issued April 23, 1915.

From the above facts it is apparent that McPhee's claim is based upon the proposition that the land applied for by him was excepted from the railway selection by virtue of O'Donnell's settlement. McPhee failed to show any privity with O'Donnell, or exactly what land O'Donnell claimed under his settlement. Further, the settlement of O'Donnell is the same as that asserted by Thurston as transferee from O'Donnell. Thurston's application was allowed on the basis of O'Donnell's settlement right. The petition, however, asserts that if the showing made in the affidavits submitted by McPhee is correct, the action of the Department in allowing Thurston's application was erroneous and that a suit to set aside the patent issued to Thurston might be instituted. Thurston's [85] final proof, which was substantiated by a field investigation, disclosed that he established residence in December, 1906, lived continuously upon the land with his family, cultivated about one acre and had a house, barn and other improvements valued at \$3,000.

O'Donnell's settlement claim in any event could not exceed 160 acres. O'Donnell was not in privity with McPhee but was with Thurston. The particular 160 acres claimed by O'Donnell was asserted by Thurston to be the same tract applied for by him and was so determined by the Department without objection from McPhee. McPhee purchased Bee-

be's relinquishment after Beebe's application had been rejected, and failed to file any protest against the allowance of Thurston's entry, final proof, or the issuance of patent thereon. He further delayed for a period of over a year since the final decision of the Department against him before filing the present petition. The Department, therefore, sees no reason sufficient to warrant a recall of its former rulings.

The petition is accordingly denied.

(Signed) ANDRIEUS A. JONES,
First Assistant Secretary. [86]

No. 20303.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

Washington, May 6, 1916.

Homestead Application 01723 rejected. Petition for supervisory authority denied.

ELBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILROAD COMPANY.

Register and Receiver,
Seattle, Washington.

Sirs:

On April 8, 1916, the resident attorney on behalf of Elbert R. McPhee filed in the office of the Secretary of the Interior, a petition for the exercise of supervisory authority in the matter of homestead

application 01723, filed September 27th, 1909, by Elbert R. McPhee, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 12, T. 39 N., R. 6 E., which was ordered rejected by departmental decisions of December 8, 1910, and November 18, 1915, for conflict with lieu selection list No. 44 (01653) filed May 19, 1902, by the St. Paul, Minneapolis and Manitoba Railway Company under act of August 5, 1892 (27 Stat. 390). Said homestead application 01723 was finally rejected and the case closed by letter "F" of January 15, 1915.

On April 18, 1916, the First Assistant Secretary of the Interior considered the petition for the exercise of supervisory authority and denied the same and on April 24, 1916, the record in the above-entitled case was returned to this office with the statement that the decision of the Department dated April 18, 1916 had become final.

Accordingly, homestead application 01723 by Elbert E. [87] No. 20303, p. 2.

McPhee will stand rejected. Two copies of Departmental decision of April 18, 1916 are herewith enclosed for your use, and the files of your office. One copy of said decision will be furnished the resident attorney of Elbert R. McPhee. You will advise McPhee hereof. You will make the proper notations upon the records of your office, referring to this letter by date and initial.

You will also advise Mr. Thomas R. Benton, St. Paul, Minnesota, attorney for the St. Paul, Minne-

apolis and Manitoba Railway Company.

Very respectfully,

D. K. PARROTT,

Acting Assistant Commissioner. [88]

D—13396.

“F”

Seattle 01723.

Homestead Application rejected.

Denied.

ALBERT R. MCPHEE

vs.

ST PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY COMPANY.

AFFIDAVITS IN SUPPORT OF PETITION
FOR REHEARING.

State of Washington,

County of Whatcom,—ss.

Peter Beebe, of Maple Falls, Washington, being first duly sworn on oath deposes and says: that he is a native born citizen of the United States of the age of Sixty (60) years. That affiant has resided in Whatcom County, Washington, for Fourteen (14) years last past immediately preceding the making of this affidavit. That affiant has been well acquainted with the lands situated in Section 1, and in Section 12, Township 39, North of Range 6 East W. M., since the year 1906. That about the month of August, 1906, affiant settled upon and claimed as a homestead the South half of the Southwest Quarter of Section 1, and the North half of the Northwest Quarter of Section 12, all in

Township 39, North of Range 6 East W. M., and that he resided continuously thereon until on or about the month of November 1906. That during the month of November, 1906, affiant entered into an exchange agreement with one John W. Thurston for a good and valuable consideration, by which said agreement affiant relinquished and released to the said John W. Thurston his rights in and to the Southeast Quarter of the Southwest Quarter of Section 1, and the Northeast Quarter of the Northwest Quarter of Section 12. That in consideration of said exchange and relinquishment to said Thurston by affiant, and in further consideration of the sum of Fifty Dollars paid to affiant by the said John W. Thurston, said John W. Thurston relinquished and transferred to this affiant any and all rights which he had in and to the Southwest Quarter of the Northwest Quarter of Section [89] 12, and the Northwest Quarter of the Southwest Quarter of Section 12. That at the time of said exchange affiant knows of his own personal knowledge that there was improvements located and situated upon the Southwest Quarter of the Northwest Quarter of Section 12, Township 39, North of Range 6 East W. M., which said improvements consisted of a log cabin of approximately the size of 12' by 16', and certain clearing which had been done upon said forty acres of land consisting of approximately one acre. That on or about the 29th day of September, 1909, affiant released all of his claim in and to all of the lands above described in Section 12, and sold the improvements thereon consisting

of said cabin, and clearing, to Albert R. McPhee, for the sum of Fifty Dollars (\$50.00), which was paid by said McPhee to affiant. That affiant knows of his own personal knowledge that immediately after the transfer of his interest to said Albert R. McPhee that said McPhee went immediately upon said land with his family and took up his residence upon the same and made other improvements upon the Southwest Quarter of the Northwest Quarter of Section 12, and that said McPhee has continuously resided upon said Southwest Quarter of the Northwest Quarter of Section 12, ever since said time up to the present. That affiant executed and delivered to said McPhee a transfer of the improvements located upon said land. That affiant knows of his own personal knowledge that immediately after said transfer one Ed Magner went upon the Southwest Quarter of the Northwest Quarter of Section 12 and erected and constructed additional improvements thereon for the said Albert R. McPhee, all of which said improvements including the cabin formerly located upon said land are now on said forty acre tract. That affiant has been well acquainted with the location and character of the Southeast Quarter of the Southwest Quarter of Section 1, and the East half of the Northwest Quarter and the Northeast Quarter of the Southwest Quarter of Section 12, all in Township 39 North of Range 6 East W. M., for ten years last past, and that affiant knows of his own personal [90] knowledge that there were no improvements of any

kind, character or description upon any of said land last described prior to August, 1906, said land last described being the land upon which patent was issued April 29th, 1913, to John W. Thurston.

PETER BEEBE.

Subscribed and sworn to before me this 8th day of May, 1916.

[Seal]

JOHN A. KELLOGG,

Notary Public for Washington, Residing at Bellingham. [91]

State of Washington,
County of Whatcom,—ss.

E. M. Magner, of Glacier, Washington, being first duly sworn on oath says: That he is a citizen of the United States of the age of fifty-one years. That he has resided continuously in Whatcom County, Washington, for eleven years last past immediately preceding the making of this affidavit. That affiant is well acquainted with the lands situated in Section 12, Township 39, North of Range 6 East W. M. That on or about the 20th day of September, 1909, affiant, for and on behalf of Albert R. McPhee, went upon the Southwest Quarter of the Northwest Quarter of Section 12, and made improvements thereon for said McPhee consisting of a house about 12 feet by 18 feet in size, and built a trail leading to the said land. That affiant knows of his own personal knowledge that at said time there were improvements situated on said Southwest Quarter of the Northwest Quarter of Section 12, consisting of a log cabin about 12 feet

by 18 feet in size and a well defined trail, which showed that the same had been frequently traveled and used. That affiant states that it was generally known in the community of Glacier, Washington, that said log cabin was placed upon said 40 acre tract of land by one Al Small, and was later transferred by the said Al Small to one Dan O'Donnell, and was known in the community as the O'Donnell improvements. That affiant knows of his own knowledge that the said Albert R. McPhee immediately entered into possession of said forty acre tract of land, together with other lands, and he, together with his family have continuously resided upon the same ever since September, 1909. That affiant was present at the time of the transfer made by Peter Beebe to Albert R. McPhee of the improvements and rights to the Southwest Quarter of the Northwest Quarter, and the Northwest Quarter of the Northwest Quarter and the Northwest Quarter of the [92] Southwest Quarter, all in Section 12, Township 39, North of Range 6 East W. M., and that affiant knows that the consideration for said transfer was agreed upon as the sum of Fifty Dollars. That affiant has been well acquainted with the location and character of the Southeast Quarter of the Southwest Quarter of Section 1, and the East half of the Northwest Quarter and the Northeast Quarter of the Southwest Quarter of Section 12, all in Township 39, North of Range 6 East W. M., for ten years last past, and that affiant knows of his own personal knowledge that there were no improvements of any kind,

character or description upon any of said land last described prior to January 1st, 1906, said land last described being the land upon which patent was issued April 29th, 1913, to John W. Thurston.

E. M. MAGNER.

Subscribed and sworn to before me this 8th day of May, 1916.

[Seal]

JOHN A. KELLOGG,

Notary Public for Washington, Residing at Bellingham. [93]

State of Washington,

County of Whatcom,—ss.

Al Small, being first duly sworn on oath deposes and says: That he is a citizen of the United States of the age of Forty-six years, and that his present Post Office address is Ferndale, R. F. D. No. 1, Washington. That he has been well acquainted with the location and character of lands embraced in Section 1 and Section 12, Township 39, North of Range 6 East W. M., since the fall of 1901. That in the fall of 1901 at the request of one C. C. Cole and employed by said Cole, affiant went upon the Southwest quarter of the Northwest quarter of Section 12, Township 39, North of Range 6 East, and did some work and made some improvements for the said C. C. Cole and blazed and opened a trail from said land to the county road, and commenced the erection of a cabin upon said forty, which was of approximately the size of 12X18 feet. That affiant partly constructed the said cabin, and that the said C. C. Cole occupied the same and

settled upon the west half of the Northwest quarter of section 12, and the west half of the southwest quarter of Section 12, Township 39, North of Range 6 East W. M., and claimed the same as a homestead about the 1st of September, 1901. That affiant knows of his own knowledge that the said C. C. Cole continued to occupy said land and claim the same as a homestead up until the month of October, 1901, on which date the said C. C. Cole sold and transferred his rights to said homestead and the improvements thereon to one Dan O'Donnell. That affiant knows that said O'Donnell immediately after the purchase of said improvements from said Cole, went upon said land and occupied the same as a homestead and completed the construction of the cabin started upon said land. That affiant was a witness for one John W. Thurston at the time of a hearing in the United States Land Office at Seattle, at which time the said John W. Thurston was attempting to prove that there had been a prior right of homestead [94] and settlement upon certain lands which he claimed as a homestead, said priority being for the purpose of defeating script filed by the St. Paul, Minneapolis and Manitoba Railway Company on such land. That affiant at said hearing testified that the improvements to which he testified were located upon the Southwest quarter of the Northwest quarter of Section 12, Township 39, North of Range 6 East W. M. That affiant is well acquainted with the land upon which patent was finally issued by the United States Government to John W. Thurston.

and affiant knows of his own knowledge that no improvements were ever made upon any of such lands prior to the time the same were made by said Thurston, which affiant believes to be about the year 1906. That affiant knows of his own knowledge that the improvements used by said Thurston to establish his prior right upon the land which he claimed as a homestead were the same and identical improvements as hereinbefore mentioned by affiant as being located upon the Southwest quarter of the Northwest quarter of Section 12.

AL. SMALL.

Subscribed and sworn to before me this 9th day of May, 1916.

[Seal]

JOHN A. KELLOGG,
Notary Public for Washington, Residing at Bel-
lingham. [95]

State of Washington,
County of Whatcom,—ss.

Fred Benson, being first duly sworn on oath says: that he is a citizen of the United States of the age of thirty-seven years, and that his present postoffice address is Glacier, Washington. That he has been well acquainted with lands in Section 12, Township 39, North of Range 6 East W. M., for eleven (11) years last past immediately preceding the making of this affidavit. That he knows of his own personal knowledge that the improvements on the Southwest quarter of the Northwest quarter of said section commonly known

as the Dan O'Donnell improvements are the same and identical improvements which affiant photographed during the summer of 1910 or 1911 for one John W. Thurston. That affiant knows of his own personal knowledge that said improvements are not upon any part of the land which was finally patented by the United States to said John W. Thurston. That affiant knows of his own knowledge that there were no improvements of any kind or character upon any land upon which patent was finally issued to said John W. Thurston prior to the fall of 1906.

This affidavit is made supplemental to that affidavit of affiant dated April 18th, 1911, and now a part of the record in this proceeding.

FRED BENSON.

Subscribed and sworn to before me this 9th day of May, 1916.

[Seal]

JOHN A. KELLOGG,

Notary Public for Washington, Residing at Bel-
lingham. [96]

State of Washington,

County of Whatcom,—ss.

Dan O'Donnell, being first duly sworn on oath deposes and says: That he is a citizen of the United States of the age of thirty-five years, and that his present postoffice address is Deming, Washington. That on or about the first of October, 1901, he purchased from one C. C. Cole all improvements and rights which the said C. C. Cole had in certain lands claimed as a homestead located

near Glacier, Washington. That affiant immediately after said purchase entered into possession of said lands and improvements thereon and finished the completion of a cabin which had been started by said Cole, and did some additional work on the trail and a little clearing. That affiant transferred whatever right or interest he had in said land and the improvements thereon, to one John W. Thurston in the spring of the year 1906. That it was the understanding of affiant that he had no right in any land except such as he had purchased from one C. C. Cole, and that he paid the said C. C. Cole for the relinquishment of his rights and improvements the sum of One Hundred Dollars (\$100.00), and that he transferred his rights to John W. Thurston for the consideration of One Hundred Dollars (\$100.00). That it was the understanding of affiant that when he transferred his rights in land to one John W. Thurston that he transferred the same rights and the same improvements which he had theretofore purchased from said C. C. Cole. That affiant is not acquainted with the legal description of said land according to the new survey of the same made in 1907 and is unable to state from his own knowledge the exact legal description of the land acquired by him from Cole and transferred by him to John W. Thurston.

DAN O'DONNELL.

Subscribed and sworn to before me this 10th day of May, 1916.

[Seal]

JOHN A. KELLOGG,

Notary Public for Washington, Residing at Bel-
lingham. [97]

State of Washington,
County of Whatcom,—ss.

Albert R. McPhee, being first duly sworn on oath deposes and says: That in the month of January, 1915, he received notice that the Secretary of the Interior at Washington D. C. had on November 18th, 1914, denied the motion of affiant for a rehearing and reconsideration of the decision of said Secretary of the Interior rendered on December 8th, 1910. That affiant was then advised by his attorney J. H. Cannon, of Maple Falls, Washington, that said attorney could do nothing further for affiant in connection with said matter, and that affiant then went to the City of Seattle, Washington, and consulted two attorneys regarding the same. That all of said attorneys informed affiant that they would require a cash retainer of One Hundred Dollars before proceeding to represent him, and that affiant was unable to raise said sum of money, and unable to employ either of said attorneys, and returned to his home at Glacier, Washington, and went to work at common labor by the day in order to secure sufficient funds with which to employ an attorney to further represent him in connection with his application for a hearing. That about the 15th of August, 1915, affiant consulted with H. C. Thompson, an attorney at law of Bellingham, Washington, and made arrangements with the firm of Kellogg & Thompson by which said firm of attorneys would represent him in his application for a hearing before the Secretary of the Interior at

Washington, D. C. That affiant has always been diligent in trying to press his rights before the Secretary of the Interior, and has made every effort to be represented, but was unable to employ counsel prior to August, 1915, after learning that his application for rehearing had been denied.

This affidavit is made supplemental to that affidavit heretofore made by me on April 18th, 1911, which is now a part of [98] the records and filed in this matter, and I request that the allegations contained in said former affidavit be by the Department considered in connection with this application for rehearing.

Affiant further says that he never at any time had any knowledge or information which would lead him to believe that one John W. Thurston was using the improvements located upon affiant's land, to wit: on the Southwest quarter of the Northwest quarter of Section 12, in making final proof, until on or about December, 1914. That affiant knew that the said John W. Thurston claimed as a homestead some other land adjoining the claim of affiant, but that said Thurston had never asserted any claim of any kind or character to any land located in the West half of the West half of said Section 12, and affiant therefore paid no attention to any hearing had by said Thurston in the Land Office at Seattle, nor was he notified of any such hearing or of the fact that any of affiant's rights were prejudiced by reason of any proof made therein.

ALBERT R. McPHEE.

Subscribed and sworn to before me this 10th day of May, 1916.

[Seal]

JOHN A. KELLOGG,

Notary Public for Washington, Residing at Bellingham. [99]

State of Washington,
County of Whatcom,—ss.

H. C. Thompson, being first duly sworn on oath says: That he is a citizen of the United States of the age of thirty-eight years, and is an attorney at law engaged in the practice of law at Bellingham, Washington. That on or about the 15th day of August, 1915, affiant was consulted by one Albert R. McPhee concerning his rights in a certain homestead which said McPhee claimed in certain lands located near Glacier, Washington. That at said time satisfactory arrangements were made by which affiant was engaged to represent said McPhee to endeavor to secure for him a rehearing and reconsideration of the decision of the Department of the Interior theretofore entered. That on August 18th, 1915, affiant wrote a letter to an attorney in Washington, D. C., to wit, James I. Parker, of 1410 H. Street, in which affiant requested that said Parker be employed by affiant for the purpose of assisting in the conduct of the application for rehearing. That on August 24th, 1915, affiant received a letter from said James I. Parker in which he said that he would make an examination of the records in said matter and advise affiant later. That on September 30th, 1915, affiant received a letter from said James I. Parker

in which he said he would be unable to handle this matter, and would not care to undertake such employment. That affiant then immediately began to seek some other attorney who would be willing to enter the employ of Albert R. McPhee together with affiant, and on December 8th, 1915, wrote Mr. Samuel Herrick, an attorney at law of Washington, D. C., regarding such employment. That various correspondence was had between affiant and said Samuel Herrick, and on January 10th, 1916, affiant received a letter from said Samuel Herrick in which he agreed to certain terms of employment, and agreed to represent the said Albert R. McPhee in connection with affiant in said matter before the Secretary of the Interior. That a delay of thirty or sixty days was occasioned after said date in the filing of a petition for reconsideration [100] because of the fact that it was necessary for said McPhee to raise the sum of Fifty Dollars, which he did as soon as possible.

H. C. THOMPSON.

Subscribed and sworn to before me this 10th day of May, 1916.

[Seal]

JOHN A. KELLOGG,
Notary Public for Washington, Residing at Bel-
lingham. [101]

DEPARTMENT OF THE INTERIOR,
WASHINGTON.

July 10, 1916.

“F”

Seattle 01723

Homestead Application Rejected.
Petition Denied.

D—13396.

ELBERT R. MCPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY COMPANY.

PETITION FOR THE EXERCISE OF SUPER-
VISORY AUTHORITY.

Elbert R. McPhee has filed a petition for the exercise of the Department's supervisory authority in the matter of the rejection of his homestead application for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., W. M.

The case is before the Department for the second time, upon motion for the exercise of supervisory authority. The brief submitted herein has been carefully considered, but it is found that no argument is advanced therein, nor new question raised, that had not been presented and argued when the case was previously here upon similar petition. At that time the petition was denied, in a well-considered decision in which the material facts of the case were fully set out, and the reasons for denying the petition stated.

The case, in its different aspects, has been before the Department at other times, and an examination of the record discloses that the decisions rendered sustaining the original action rejecting the application, and refusing to rescind said action, were fully justified and warranted under all the facts and circumstances appearing.

The petition failing to present any matter which, it would appear, has not heretofore been fully considered, it is proper to deny the same, and it is accordingly so ordered.

(Signed) ANDRIEUS A. JONES,
First Assistant Secretary. [102]

No. 20,509.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington.

July 31, 1916.

Promulgating Departmental
Decision of July 10, 1916.

ELBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

Register and Receiver,
Seattle, Washington.

Sirs:

On June 3, 1916, the resident attorney, on behalf of Elbert R. McPhee, filed in the office of the Sec-

retary of the Interior a petition for the exercise of supervisory authority in the matter of homestead application 01723, filed September 27, 1909, by Elbert R. McPhee, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., which was ordered rejected by Departmental decisions of December 8, 1910, and November 18, 1914, for conflict with lieu selection list No. 44 (01653), filed May 19, 1902, by the St. Paul, Minneapolis and Manitoba Railway Company, under the act of August 5, 1892 (27 Stat. 39). Said homestead application 01723 was finally rejected and the case closed by letter "F" of January 15, 1915.

On April 18, 1916, the First Assistant Secretary of the Interior considered the petition for the exercise of the supervisory authority, and on April 24, 1916, the record in the case was returned to this office for appropriate action.

On July 10, 1916, the First Assistant Secretary of the Interior considered the second petition filed on behalf of [103] McPhee for the exercise of supervisory authority, and denied the same, and on July 14, 1916, the record in the case was returned to this office with the statement that the decision of the Department hereinbefore referred to had become final. Accordingly, said homestead application 01723, by Elbert R. McPhee will stand rejected and the case closed.

Two copies of Departmental decision of July 10, 1916, are herewith enclosed for your use and for the files of your office. One copy of said decision will be furnished the resident attorney for the

Northern Pacific Railway Company. You will advise McPhee hereof.

You will also advise Mr. Thomas R. Benton, St. Paul, Minnesota, attorney for the St. Paul, Minneapolis and Manitoba Railway Company.

Very respectfully,

C. M. BRUCE,

Assistant Commissioner. [104]

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS, AND MANITOBA
RAILWAY COMPANY.

AFFIDAVIT AS TO HOMESTEAD RIGHTS
OF ALBERT R. McPHEE.

State of Washington,
County of Whatcom,—ss.

Albert R. McPhee, being first duly sworn on oath deposes and says: That he has made application to perfect title as a homestead to the following described real estate, situated in Whatcom County, Washington, to wit:

The West half of the Northwest quarter; and the Northwest quarter of the Southwest quarter of Section 12, Township 39, North of Range 6 East W. M.

That the St. Paul, Minneapolis and Manitoba Railway Company claim said land by reason of scrip selection made by said railway company on May 9th, 1902. That affiant claims said real estate as a homestead, and that affiant has a prior right in and to the same by reason of prior settlement and

improvement before the filing of said selection by said railway company on May 9th, 1902, and in support of said contention alleges the following facts:

That in 1901 a cabin was constructed upon the Southwest quarter of the Northwest quarter of said Section 12, by one C. C. Cole. That at the time of the construction of said cabin, all rights in and to the improvements and in and to the rights of the claimant C. C. Cole as a homesteader, for a good and valuable consideration of One Hundred Dollars, were transferred by said C. C. Cole to one Dan O'Donnell, who immediately entered into possession of said improvements, and claimed a homestead right on the following real estate:

The West half of the Northwest quarter, and the Northwest quarter of the Southwest quarter, of Section 12, Township 39, North of Range 6 East W. M. [105]

That thereafter in the year 1906, the said Dan O'Donnell, for a good and valuable consideration of One Hundred Dollars (\$100.00), sold and transferred to John W. Thurston, the improvements heretofore mentioned, together with the settlement right upon the real estate claimed by said Dan O'Donnell as a homestead. That thereafter and during the same year, 1906, said John W. Thurston for a good and valuable consideration of Fifty Dollars (\$50.00) entered into an exchange agreement with one Peter Beebe, by which said agreement the said Peter Beebe relinquished to the said John W. Thurston all rights which he might have in and to the Southeast quarter of the Southwest quarter of

Section 1, and the Northeast quarter of the Northwest quarter of Section 12. That in consideration of said exchange and relinquishment and the said sum of Fifty Dollars, the said John W. Thurston relinquished and transferred to the said Peter Beebe any and all rights which he had in and to the Southwest quarter of the Northwest quarter of Section 12, and the Northwest quarter of the Southwest quarter of Section 12, which said land so transferred by Thurston to Beebe contained the original improvements made in the year 1901. That thereafter the said Peter Beebe, for a good and valuable consideration of Fifty Dollars, sold and transferred to this affiant Albert R. McPhee, the improvements hereinbefore mentioned, and also the settlement right upon said real estate. That this affiant immediately entered into possession of said real estate and of said improvements, and has continuously resided upon the same ever since, and does now reside upon said real estate and claims the same as a homestead.

That affiant has been denied the right to claim the same as a homestead by the Department of the Interior of the United States for the reason that the improvements herein mentioned and described as being upon the land of affiant were used by one John W. Thurston in making final proof upon a homestead adjoining the land of this affiant, and on February 6th, 1907, said John W. [106] Thurston made homestead application and finally received patent for the Southeast quarter of the Southwest quarter of Section 1, and the East half of the North-

west quarter, and the Northeast quarter of the Southwest quarter of Section 12, but that said John W. Thurston, in making final proof upon said homestead claim, did use and claim the improvements of this affiant located upon the Southwest quarter of the Northwest quarter of said Section 12. That affiant has prepared and filed with the Department of the Interior affidavits of all of the witnesses used by the said John W. Thurston in making final proof upon his homestead application, showing that the improvements mentioned and described in the final proof of said Thurston are upon the homestead claim of this affiant.

Said Department has rejected the application of this affiant and among other reasons *dor* doing so stated that no objection or protest was ever made by this affiant to the final proof of said John W. Thurston, and in this connection affiant alleges that he never had any knowledge or information to the effect that the said John W. Thurston was using the improvements located upon the land of this affiant for the purpose of making final proof, until the latter part of the year 1914. That affiant has diligently prosecuted his cause before the Land Department in Washington, and the Department of the Interior, but will be greatly defrauded if finally denied his rights herein because of the fraud practiced by one John W. Thurston in making final proof upon his homestead as heretofore alleged. That affiant can secure and present affidavits of all parties ever having any interest in the said homestead claim claimed by affiant prior to the year 1906

and back to the year 1901, and at the time of the construction of the original improvements and settlement, which said time is long prior to the time of the filing of the selection by said railway company.

Wherefore affiant asks that such action may be taken as may fully protect the rights of this affiant to secure for him his homestead rights in the land claimed as heretofore alleged.

ALBERT R. McPHEE.

Subscribed and sworn to before me this 5th day of October, 1916.

JOHN A. KELLOGG, [107]

October 17, 1916.

The Attorney General,
Department of Justice,
Washington, D. C.

Sir:

I have the honor to file herewith an affidavit and other papers in connection with the claim of Albert R. McPhee, for the W.1/2 NW.1/4 and the NW.1/4 SW.1/4 of section 12, T. 39 N., R. 6 E. Washington.

These papers show in brief that McPhee has been a homestead settler on said land in good faith for a number of years past; that the land has been also claimed by the St. Paul, Minneapolis and Manitoba Ry. Co. under a scrip selection made on May 9, 1902; that at that date, and prior thereto, the land was duly claimed by a homesteader named Dan O'Donnell, who had purchased the cabin and the claim from one C. C. Cole, a prior claimant; that this claim and cabin were subsequently acquired by

McPhee through mesne conveyance; that the Interior Department has recognized that the homestead claim and cabin aforesaid would defeat the Railway's scrip, under authority of Departmental and Supreme Court decisions; but that it has already held that the said cabin excepted the adjoining tract from the Company's scrip, namely, the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ section 12, which were claimed by a homesteader named John W. Thurston; that in the hearing between Thurston and the Railway Company the testimony described the land of Mr. McPhee as being that on which the cabin was situated, but this fact was not observed by the Interior Department, and accordingly the Thurston land was held to be excepted from the railroad scrip and patent was issued to Thurston.

These facts were duly shown to the Interior Department by a petition for the exercise of supervisory authority, but such petition was denied on April 18th and July 10, 1916, respectively, on the ground that no explanation was given by McPhee for the long delay in filing the petition and showing the facts, also that he failed to file any protest against the allowance of Thurston's entry, final proof and the issuance of patent thereon. Thereupon we filed another [108] petition with the Interior Department, accompanied by affidavits showing that McPhee was not aware of the mistake or error, or of Thurston's fraud, until too late to protest against the latter's proof, and that his delay thereafter was caused by circumstances over which

he had no control. The Department denied this petition on July 10th, 1916, without discussion, except to state that "the petition failing to present any matter which it would appear has not heretofore been duly considered, it is proper to deny the same."

Your attention is respectfully invited to the fact that new matter *was* set up, namely, the excellent reasons existing for McPhee's delay, and his lack of knowledge of Thurston's use of the O'Donnell cabin, and securing issuance of patent thereon.

It therefore appears that fraud has been practiced on the Department by Thurston, and some of his witnesses, as the result of which he has secured United States patent for a tract of land to which he is not entitled, and the claim of the Railway Company thereto has been denied, and as a further result the right and the valid claim of Mr. McPhee to the land first above described have been likewise denied. It is earnestly submitted that these facts present proper reasons for the institution of a suit by your Department against the Thurston patent, to the end that that land may be patented to the St. Paul, Minneapolis and Manitoba Ry. Co., and to the end that the McPhee entry of the other tract may be reinstated, and McPhee allowed patent thereon. Otherwise gross fraud will have been perpetrated upon the Government, and an innocent man made to suffer.

The papers filed herewith, and made a part hereof, are copies of the Department's decisions of December 8, 1910, April 18, 1916, and July 10, 1916;

copy of petition for the exercise of supervisory authority; copy of letter of April 10, 1916; copy of affidavits filed with the Interior Department; and original affidavit of McPhee, dated October 5, 1916.

In conclusion your attention is invited to the fact that McPhee's action for rehearing of the first Departmental decision was pending before that Department for nearly four years, and thus [109] indicating that there was probably some doubt in the legal minds of the Department as to the decision which should be rendered.

With a prayer for your early and favorable consideration of this matter, I am

Very respectfully,
SAMUEL HERRICK,
Attorney for Albert R. McPhee.

Encl. [110]

October 25, 1916.

The Secretary of The Interior,
Sir:

I inclose herewith for your consideration and commendation a copy of a letter, dated October 17, 1916, addressed to the Attorney General by Samuel Herrick, Esq., attorney for Albert R. McPhee, and a copy of an affidavit executed by Mr. McPhee, October 5, 1916, in regard to his homestead claim to the W.1/2 of the NW.1/4 and NW.1/4 of the SW.1/4 in Section 12, T. 39 N., R. 6 E, in the State of Washington.

Mr. Herrick seems to feel that his client has been unjustly treated and has applied to this Department

for relief. I shall be glad to have your advice at as early a date as practicable.

Very respectfully,

For the Attorney General:

(Signed) ERNEST KNABEL,

Assistant Attorney General.

Inclo. 59861. [111]

DEPARTMENT OF THE INTERIOR,

WASHINGTON.

Nov. 17, 1916.

Dear Mr. Attorney General:

I am in receipt of your letter of October 25, 1916, enclosing a copy of a letter dated October 17, 1916, from Mr. Samuel Herrick of this city and a copy of an affidavit executed by Albert R. McPhee, dated October 5, 1916, relative to his former homestead claim (01723) for the W.1/2 NW.1/4 and NW.1/4 SW.1/4, Sec. 12, T. 39 N., R. 6 E., Seattle, Washington, land district, requesting advice in the premises. In response I have to report that on September 27, 1909, Elbert R. McPhee filed application 01723 to make a homestead entry for the W.1/2 NW.1/4 and NW.1/4 SW.1/4, Sec. 12, T. 39 N., R. 6 E.

Attention is called to the fact that the homestead claimant in his original application papers signed his name as Elbert and in the subsequent papers as Albert R. McPhee.

On May 9, 1902, the St. Paul, Minneapolis and Manitoba Railway Company selected the above described tracts per list No. 44 under the same terms of the Act of August 5, 1892 (27 Stat., 390). The

plat of survey for these tracts was filed in the local office on February 6, 1907, and on February 23, 1907, the company conformed its list of selections to the public survey.

Said homestead application 01723 was rejected by the Register and Receiver upon the ground that the tracts in question had been selected by the said railway company as hereinbefore stated. McPhee filed an appeal to the General Land Office based on the ground that on August 29, 1909, he purchased the homestead right to these tracts from one Peter Beebe, who alleged settlement thereon August 16, 1906, and by decision "F" dated May 7, 1910, the decision of the local office was affirmed, subject to the usual right of appeal. On December 8, 1910, the case being before the Department on appeal by McPhee, the First Assistant Secretary affirmed the decision of the Commissioner of the General [112] Land Office of May 7, 1910.

On November 18, 1914, the First Assistant Secretary of the Interior denied a motion for rehearing of departmental decision of December 8, 1910, filed on behalf of McPhee and by Commissioner's letter of January 15, 1915, said departmental decision was promulgated and homestead application 01723 rejected.

On April 8, 1916, a motion was filed on behalf of McPhee for the exercise of supervisory authority of the department and on April 18, 1916, said petition was denied in a carefully considered decision of the First Assistant Secretary. On June 3, 1916, the resident attorney on behalf of McPhee filed in

this office a second petition for the exercise of supervisory authority of the Department in the matter of said homestead claim 01723, and on July 10, 1916, the First Assistant Secretary denied said petition and among other things said:

“The case, in its different aspects, has been before the Department at other times, and an examination of the record discloses that the decisions rendered sustaining the original action rejecting the application, and refusing to rescind said action, were fully justified and warranted under all the facts and circumstances appearing. The petition failing to present any matter which, it would appear has not been heretofore duly considered, it is proper to deny the same, and it is accordingly so ordered.”

On April 14, 1916, the record in the above entitled case was returned to the General Land Office and by Commissioner's letter “F” of July 31, 1916, the Department decision of July 10, 1916, was promulgated and the case closed.

The records also disclose that on February 6, 1907, John W. Thurston filed homestead application 01662 for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., which was rejected because of conflict with the railway company's selection as to all tracts except the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, T. 39 N., R. 6 E., and by Department decision of March 19, 1910, a hearing was ordered to determine the rights between Thurston and the Railway Company. As a result of the hearing the homestead application 01662 of John W. Thurston

was allowed August 22, 1911, upon which he submitted final proof September 28, 1912, final certificate issuing January 24, 1913, and [113] patent issued thereunder April 29, 1913. Thurston's application was sustained and allowed on the basis of the settlement claim or possessory right secured prior to and existing at the date of the railroad company's selection by one O'Donnell, with whom Thurston was shown to be in privity of estate or interest. The facts disclosed by the latter's final proof were further ascertained by means of a field investigation had by direction of the Commissioner of the General Land Office.

From the findings contained in the decisions of this Department above referred to, copies of which it is stated have been furnished you, I am of the opinion that no action looking toward the setting aside of a patent issued to Thurston should be taken.

Cordially yours,
(Signed) B. SWEENEY,
Assistant Secretary.

The Honorable, The Attorney General. [114]

EXHIBIT "A."

Glacier, Wn., Dec. 31, 1916.

Secretary of the Interior,
Washington, D. C.

Dear Sir:

I, Albert R. McPhee have made homestead entry on the W.1/2 of the NW.1/4, W.1/2 SW.1/4 of Section 12 Township 39 N. Range 6 East, Glacier, Wn.

This land was covered with railroad script and I claim prior rights to said land. Now I have been trying for the last five years to get a hearing against the railroad at our local land office in Seattle, Wn. finding it to be a hopeless case. I forwarded my affidavits to the General Land Office, Washington, D. C. From the look of things I guess my attorneys made it appear to you as though I was trying to get a rehearing. Now if you will look up the records in the local land office you will see that I have never had a hearing. And that I never have had a chance to meet the St. Paul M. & M. Railroad in court. Now I do not feel that I have had a fair chance in trying to win the homestead. I have made my home there and I feel that I ought to have a hearing anyway to give me some chance of trying to prove that I am in the right. I have made a home for myself and family here and I do not feel like giving up without trying to win anyway. Now I hope this letter will help you to understand a little of how I feel and that you will try and get me a hearing. Hoping I will hear from you at an early date, I am

Yours respec.,
ALBERT R. McPHEE. [115]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON.

January 16, 1917.

ALBERT R. McPHEE

vs.

ST. PAUL, MINNEAPOLIS AND MANITOBA
RY. CO.

Mr. Albert R. McPhee,
Glacier, Washington.

My Dear Sir:

In reply to your letter dated December 31, 1916, addressed to the Secretary of the Interior, you are informed that by letter "F," dated July 31, 1916, addressed to the local officers at Seattle, Washington, there was promulgated Departmental decision dated July 10, 1916, denying a second petition filed in your behalf for the exercise of the supervisory authority of the Department in the matter of your homestead application filed September 27, 1909, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 12, T. 39 N., R. 6 E., Washington, which homestead application had been ordered rejected by previous Departmental decisions dated December 8, 1910, and November 18, 1914, for conflict with the selection of the railway company above named, under the act of August 5, 1892 (27 Stat., 39). The local officers were directed to notify you of the action therein taken, and notice was given directly by this office to Mr. Samuel Herrick of this city as your

attorney of record. It appears from the record in said case that your claim to the lands above described was very carefully considered, both in this office and in the Department, and there appears to be no relief which can be afforded to you, the record showing that the decisions rendered were fully justified and warranted under all the facts and circumstances set forth.

Very respectfully,

C. M. BRUCE,

Assistant Commissioner. [116]

Exhibit "B."

Seattle, Wash., February 6, 1907.

I, John W. Thurston, of Maple Falls, Washington, applying to enter the following described non-mineral public land, to wit, the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1, E. $\frac{3}{4}$, NW. $\frac{1}{4}$, NE. $\frac{1}{4}$, SE. ; Section 12, in Township 39 North of Range 6 East, do solemnly swear that since August 30th, 1890, I have not acquired title to, nor am I now claiming under any of the public land laws of the United States, other than the mineral land laws, an amount of land which, together with the lands above described, exceed in the aggregate 320 acres.

JOHN W. THURSTON.

Subscribed and sworn to before me this 6th day of February, 1907, at my office in Seattle, King County, in State of Washington.

J. HENRY SMITH,

Register. [117]

Land Office at Seattle, Wash.,
February 6, 1907.

I, John W. Thurston, of Maple Falls, Washington, do hereby apply to enter under Section 2289, Revised Statutes of the United States, the SE. $\frac{1}{4}$ SW., Section 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, in Township 39 North of Range 6 East, containing — acres.

JOHN W. THURSTON, [118]

AFFIDAVIT AS TO SETTLEMENT.

U. S. Land Office, Seattle, Wash.

I, John W. Thurston, having filed my homestead application, do solemnly swear that I have heretofore settled on the tract of land herein applied for, to wit: SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Section 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, of Township 39 North, Range 6 East, that said application is made for the purpose of actual settlement and cultivation; that I am now residing on the land I desire to enter and that I have made a *bona fide* improvement and settlement thereon; that said settlement was commenced December 11, 1906; that my improvements consist of one story and a half house, 16x28, containing six rooms, a lean-to, 12x28 feet, chicken-house and cowshed, an acre cleared, and a half acre slashed, and that the value of the same is \$650.

JOHN W. THURSTON.

Subscribed and sworn to before me this 6th day of February, 1907.

J. HENRY SMITH,
Register. [119]

Seattle, Wash., February 27, 1907.

Mr. Edward M. Comyns,

Attorney for John W. Thurston,

Pacific Block, Seattle, Wash.

Dear Sir:

On February 6, 1907, you presented homestead application for SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, T. 39 N., R. 6 E., W. M., alleging to have made settlement upon the land applied for on December 11, 1906. The records of this office show that the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, is embraced in list No. 44, selection made by the St. Paul, M. & M. Railway, and approved by this office on May 9th, 1902.

As the selection of said Railway Company was made more than four years prior to the time you claim to have settled upon the land your right to make entry therefor must be and is hereby rejected, subject to the usual right of appeal.

You will be allowed thirty days from the date hereof in which to appeal from the action of this office to the Hon. Commissioner of the General Land Office.

Very respectfully,

J. HENRY SMITH,

Register.

Personal service of copy of the foregoing accepted on above date.

C. M. COMYNS,

Attorney for John W. Thurston. [120]

Washington, D. C., July 23, 1909.

D.

To Register and Receiver,
Seattle, Wash.

Sirs:

The township plat was filed in the local office February 6, 1907, and on the same day the homestead applicant applied to make entry for said tract and made affidavit that he commenced settlement on the land December 11, 1906, and that his improvements thereon consist of a dwelling-house, 16x28 feet, containing six rooms, chicken-house and cowshed, one acre cleared and half an acre slashed, were of the value of \$650. His application was rejected February 7, 1907, subject to appeal for the reason that the records showed that the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, were embraced in List 44, selection made by the said company, approved by your office May 9, 1902, under the act of August 5, 1892, 27 Stat. 390.

From that action Thurston appealed March 22, 1907, assigning as errors: 1. That you erred in rejecting his application for the above-described tract. 2. That failing to order a hearing to determine the relative rights of said Thurston and the St. Paul, M. & M. Ry. Co. was an error.

The tracts in conflict, viz., the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, T. 39 N., R. 6 E., while unsurveyed, were selected by the company per list No. 44, which was approved by the local office May 9, 1902, when the fees were paid, and on February 18, 1907, the company selected anew the same tract conform-

ing to the survey, which was approved February 23, 1907, by the local offices.

Thurston's application was filed February 6, 1907, the same day the township plat was filed in the local land office, and he alleged settlement December 11, 1906, after the land had been surveyed in the field.

The Company's right attached May 9, 1902, when its selection of the tract was made and the basis specified for the selection was valid; the claim of Thurston was not initiated until several years thereafter.

Your action in holding for the Company as to the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, T. 39 N., R. 6 E., is therefore affirmed, subject to the right of further appeal by Mr. Thurston. You will notify him of this action and report promptly at the expiration of his appeal period.

The Company will be advised by this office.

Very respectfully,

_____,
Acting Assistant Commissioner. [121]

DEPARTMENT OF THE INTERIOR.

BEFORE THE HONORABLE SECRETARY.

JOHN W. THURSTON

vs.

ST. PAUL, M. & M. RY. CO.

APPEAL.

Comes now John W. Thurston, by his attorney Edward M. Comyns, and appeals to the Hon. Sec-

retary of the Interior from the decision of the Hon. Commissioner of the General Land Office, dated July 23, 1909, sustaining the decision of the United States District Land Office at Seattle, Washington, adverse to this applicant, and in support of said appeal alleges error in affirming the decision of the Hon. Commissioner of the General Land Office, sustaining the action of the local office, in rejecting the homestead application of John W. Thurston for the above-described land.

E. M. COMYNS,
Attorney for Appellant. [122]

In the Matter of the Rejection of the Homestead Application of JOHN W. THURSTON for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Township 39 North, Range 6 East.

NOTICE OF APPEAL.

To the Hon. Register and Receiver of the United States Land Office, Seattle, Washington:

You and each of you will please take notice that the above-named homestead applicant, John W. Thurston, appeals to the Hon. Commissioner of the General Land Office from your decision of February 27th, 1907, rejecting the above-described homestead application.

E. M. COMYNS,
Attorney for John W. Thurston.

STATEMENT OF CASE.

On May 9, 1902, List No. 44, embracing the E. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Township 39

N., Range 6 E., was presented by the St. Paul, M. & M. Ry. Co.

On February 6, 1907, the date of the filing of the plat of said township, homestead application for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Township 39 North, Range 6 East, was presented by John W. Thurston and settlement thereof alleged December 11, 1906.

On February 27, 1906, the Hon. Register and Receiver of the local land office rejected the said application of John W. Thurston. From this decision the homestead applicant has now appealed.

SPECIFICATIONS OF ERROR.

I.

The Hon. Register and Receiver erred in rejecting the homestead application of John W. Thurston for the above-described land.

II.

The Hon. Register and Receiver erred in failing to order a hearing to determine the relative rights of said John W. Thurston and the St. Paul, M. & M. Ry. Co.

Respectfully submitted,

E. M. COMYNS,

Atty. for Appellant. [123]

DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE.

Seattle, Wash.

In the Matter of List No. 4, St. Paul, M. & M. Ry.
Co., Embracing the E. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$
SW. $\frac{1}{4}$, Section 12, Township 39 N., Range
6 E.

PROTEST.

Comes now John W. Thurston, by his attorney Edward M. Comyns, and protests against the certification of the above numbered list of the above named railway company, and the passing to patent of the land embraced therein, in so far as it includes the above described land, and asks that a hearing be ordered at which he may be permitted to establish the fact that the above described land was not on the date of its selection subject thereto, and in support of said protest and request submits the attached affidavit.

E. M. COMYNS,
Attorney for John W. Thurston.

State of Washington,
County of Whatcom,—

John W. Thurston, being first duly sworn, deposes and says: I am residing upon the above described tract of land, my postoffice address being Maple Falls, Washington. I have been acquainted with the said land for the past ten years. The land was first settled upon within my knowledge in the year 1901, by Alfred Small who built a cabin thereon and

made other small improvements in the way of clearing, trails, etc., residing on and occupying the land until March 1902, when he transferred his improvements and claim to Daniel O'Donnell. Daniel O'Donnell, immediately upon acquiring possession commenced his residence on this land and continuously occupied the same until the fall of the year 1906, said Daniel O'Donnell during all the said period being qualified to make homestead entry and occupying land with a view to make said entry. In October 1906, Daniel O'Donnell conveyed to me all his right and title to this land, together with the improvements thereon. I took up my residence on the land in December 1906 and have lived there continuously ever since, and the improvements placed by me on said land are to-day reasonably worth the sum of \$2,000. I was at all times up to February 6, 1907, the date of the filing of the plat of said township 39 N., Range 6 E., entirely ignorant of the fact that the St. Paul, M. & M. Railway Company was laying any claim to this land. On May 9, 1902, the date of the filing of selection by the Railway Company, the land [124] above described was actually occupied and improved, which occupation and improvements were readily discernible by the most casual inspection.

JOHN W. THURSTON.

Subscribed and sworn to before me this 29th day of September, 1909.

H. J. STUCKFADEN,
Notary Public in and for the State of Washington,
Residing at —

State of Washington,
County of Whatcom,—ss.

Herman Steiner and H. E. Leavitt, being first duly sworn, depose and say that they have read the foregoing affidavit of John W. Thurston; that they are of their own knowledge familiar with the facts set forth and know the same to be true.

HERMAN STEINER.

H. E. LEAVITT.

Subscribed and sworn to before me this —— day
of September 1909.

H. J. STUCKFADEN,

Notary Public in and for the State of Washington,
Residing at —— [125]

GENERAL LAND OFFICE,
WASHINGTON.

April 1, 1910.

Register and Receiver,
Seattle, Wash.

Sirs:

I enclose a copy of departmental decision in above entitled case, dated March 19, 1910, which affirms as modified office decision of July 23, 1909.

The appeal to the department was accompanied by the affidavit of Thurston, corroborated by two witnesses, in which it was alleged that the land was settled upon in 1901, by Alfred Small, who built a cabin thereon and made other improvements, occupying and residing on the land until March 1902,

when he transferred his improvements and claim to Daniel O'Donnell, a qualified entryman, who immediately took possession of the land and resided there continuously until the fall of 1906; that in October 1906, O'Donnell conveyed all his right to the same to Thurston, who has lived there continuously and placed on the premises improvements of the value of \$2,000; that he was there at all times up to February 6, 1907, when the plat was filed, entirely ignorant of the fact that the St. Paul, Minneapolis and Manitoba Railway Company was laying any claim to this land. That on May 9, 1902, the date of the filing of the selection by said company said land was actually occupied and improved.

The action of this office of July 23, 1909, on the record presented was approved, but the department holds, from the allegations contained in the affidavit accompanying the appeal, that the appellant was entitled to a hearing, in order that he may be afforded an opportunity of proving the allegations made by him; because, if as a matter of fact, the land was occupied by a qualified settler at the date of the company's selection, such land was not subject to selection (37 L. D. 193, 502 and 578).

You will therefore appoint a day for a hearing, with notice to the parties in interest to appear with their witnesses, to prove the status of the land on May 9, 1902, the date of the Company's selection.

Very respectfully,

JOHN McPHAIL,

Acting Assistant Commissioner. [126]

(Copy.)

Letter from Department of the Interior
to
Commissioner of the General Land Office.

March 19, 1910.
16855.

Sir:—

This is the appeal of John W. Thurston from your office decision of July 23, 1909, affirming the action of the local office rejecting his homestead application for the SE. quarter of SW. quarter sec. 1, E. half of NW. quarter, NE. quarter of SW. quarter Sec. 12, T. 39 N. R. 6 E, Seattle, Washington, land district.

It appears from the record and your said decision that the plat of the township in which this land is situated was filed in the local office February 6, 1907, on which day Thurston presented his homestead application for the tract above described, alleging that he had commenced settlement on the land December 11, 1906 with improvements consisting of a dwelling house 16 by 28 feet, six rooms, chicken house, cowshed one acre cleared and half an acre slashed, the value of the improvements being \$650. This application was rejected February 27, 1907 by the local office for the reason that the E. half of the NW. quarter and the NE. quarter of the SW. quarter was embraced in list No. 44 of selections made by the St. Paul, Minneapolis and Manitoba

Railway Co., filed May 9, 1902, under the provisions of the act of Aug. 5, 1892. (27 Stat. 390).

In appealing from the action of the local office, appellant alleged that the register and receiver erred in failing to order a hearing to determine the relative rights of Thurston and for the railway company and upon the record thus made your office correctly affirmed the action of the register and receiver.

However, accompanying the appeal to the Department is the affidavit of Thurston, corroborated by two witnesses, in which it is alleged that he has been acquainted with the land involved for the past ten years; that it was first settled upon within his knowledge in the year of 1901 by Alfred Small, who built a cabin thereon and made other small improvements in the way of clearing, making trails, etc. and he resided on and occupied the land until March 1902 when he transferred his improvements and claim to Daniel O'Donnell who immediately upon acquiring possession commenced his residence on the land and continued to occupy it until the fall of 1906 when he conveyed all his right and title to the land, together with all the improvements thereon to appellant; that during the period of his occupancy of the land Daniel O'Donnell was qualified to make homestead entry and occupied the land with a view of making such entry; that appellant established his residence on the land in December 1906, since which time he has lived there continuously, the improvements on the land at the present date being worth the sum of \$2,000 and he was at all times up to

February 6, 1907, the day of the filing of the plat of the township in the local office, entirely ignorant of the fact that the railway company was claiming the land in any way; that on May 9, 1902, the date of the filing of the company's selection, the land was actually occupied and improved and such occupancy and improvements were readily discernible by the most casual inspection.

While the action of your office, as above stated, was correct upon the record as presented, it would seem from the allegations contained in the affidavit accompanying the appeal, that the appellant is entitled to a hearing in order that he may be afforded an opportunity of proving the allegations made by him; because, if, as a matter of fact, the land was occupied by a qualified settler at the date of the Company's selection, such land was not subject to selection. 37 LD. 193, 502 and 576.

As thus modified the action of your office is affirmed and the papers are returned herewith with instructions to proceed as indicated herein.

FRANK PIERCE,

First Assistant Secretary. [127]

ARGUMENT.

We respectfully request the Hon. Secretary of the Interior in determining this appeal to consider *that* the protest against the certification of the lieu selection by the St. Paul, M. & M. Ry. Co., filed in the local land office by appellant herein, a copy of which is hereto attached.

Under the act of August 5, 1892, the lands subject to selection by the company are restricted to the

non-mineral lands not reserved, and to which no adverse right or claim shall have attached, or been initiated at the time of the making of such selection.

The affidavit filed in support of said protest shows *prima facie* a claim adverse to that of the company antedating its selection and existing at the time of the making of such selection.

While such *prima facie* showing indicates the fact of continuous occupation and improvement of the land by persons qualified to make homestead entry from a period long prior to the making of the selection by the company up to the present time we submit that such continuous occupation would not be required in order to defeat the claims of the company under its selection.

In order to ascertain whether a tract of land is susceptible to acquisition under act of August 5, 1892, its status at the time of the making of the selection must govern. If an adverse right or claim had been attached or been initiated at the time of the making of the selection, a subsequent *in the* change of the status of the land could not operate to revive the company's right under its selection. The opinion of the Hon. Secretary in case of Kern Oil Company et al. vs. Clark, is applicable to this case:—

“Congress had the unquestioned power to restrict the right of selection as it chose, and could so legislate as to avoid bringing a new and probably numerous class of applicants for public lands into antagonism with settlers upon and occupants of the public lands, who were there at the invitation or by

the license of the government, and whose settlement or occupancy was not shown upon the land office records. There are many instances in public land legislation where, in providing a new mode of disposing of public land, Congress has been careful to avoid contest between individuals and to prevent claimants under the new law from disturbing the possessory rights or imperfect claims of others. (XXXI L.D. 295.)

We submit that appellant is entitled to a hearing at which he may be permitted to establish the fact that an adverse claim had attached to this land, and was existing on the date of the company's selection thereof, and to this end pray that the decision of the Hon. Commissioner be reversed and set aside.

Respectfully submitted,
E. M. COMYNS,
Attorney for Appellant. [128]

UNITED STATES LAND OFFICE.

Seattle, Washington, April 12, 1910.

Contest 101.

JOHN W. THURSTON

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY CO. (Now GREAT NORTH-
ERN RY. CO.)

INVOLVING: SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and
NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 12, T.39 N.,
R. 6 E., W. M. (Seattle Serial
O1662).

To the Parties Above-named:

The plat of the township including the above de-

scribed lands was filed in this office February 6, 1907, on which day John W. Thurston above named filed homestead application for said lands, alleging that he had commenced settlement on the lands December 11, 1906, with improvements consisting of a dwelling house 16 by 28 feet, six rooms, chicken house, cowshed, one acre cleared and half an acre slashed, the value of the improvements being \$650. This application was rejected February 27, 1907, by this office for the reason that the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 12, in said township and range, was embraced in list No. 44 of selections made by the St. Paul, Minneapolis & Manitoba Railway Company, filed May 9, 1902, under the provisions of the act of August 5, 1892 (27 Stat., 390). From this rejection, said Thurston appealed to the Honorable Commissioner of the General Land Office, and from the decision of said Honorable Commissioner affirming said rejection by this office, said Thurston appealed to the Honorable the Secretary of the Interior, and accompanied the latter appeal with his affidavit, corroborated by two witnesses, which contains an allegation to the effect that the lands in question were occupied by a qualified settler at the date of the company's selection.

The Department holds that, from the allegations contained in the affidavit above referred to, the appellant is entitled to a hearing, in order that he may be afforded an opportunity of proving such allegations. By letter "F" CSB dated April 1, 1910, the Honorable Commissioner of the General Land Office promulgates said decision of the Department,

dated March 19, 1910, and directs that this office "appoint a day for a hearing, with notice to the parties in interest to appear, with their witnesses, to prove the status of the land on [129] May 9, 1902, the date of the company's selection."

You are hereby notified that such hearing will be had before the register and receiver of this office on the 24th day of May, 1910, at 10 o'clock A. M., at which time you are cited to appear and present evidence, if any you have, showing the status of the lands in question on May 9, 1902.

J. HENRY SMITH,

Register.

Registered to E. M. COMYNS,

Atty. for Thurston,

And to GREAT NOR. RY. CO. [130]

UNITED STATES LAND OFFICE,

Seattle, Washington.

CONTEST No. 101.

Involving: SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and
NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ Sec. 12, Tp. 39 N., R. 6 E.
Seattle Serial 01662.

JOHN W. THURSTON

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY CO.

DECISION.

The plat of the survey of fractional township 39 North, Range 6 East, embracing the land above described, was filed in this office on the 6th day of

February, 1907, at the hour of 9:00 o'clock A. M. At the time of the filing of said plat, to wit: February 6th, 1907, at 9:00 o'clock A. M., John W. Thurston filed a homestead application for said above described lands, and in connection with his said application alleged settlement thereon on December 12th, 1906, and that he had continued to reside thereon ever since the date of his said settlement. Prior to the filing of said plat, to wit, on the 9th day of May, 1902, the St. Paul, Minneapolis & Manitoba Railway Company filed its list of selections, No. 44, embracing all of the lands above described. On February 27th, 1907, this office rejected the said homestead application on account of the said selection of said Railway Company having been made prior to the date of the alleged settlement of said homestead applicant, from which said rejection said homestead applicant appealed to the Honorable Commissioner of the General Land Office, who by letter "F" of July 23d, 1909, affirmed our action and rejected said homestead application. Said homestead applicant having further appealed to the Department of the Interior, with his letter "F" of April 1st, 1910, the Hon. Commissioner of the General Land Office transmitted a copy of the Departmental decision of March 19th, 1910, wherein the Department [131] recites and holds as follows:

"In appealing from the action of the local office appellant alleges that the Register and Receiver erred in failing to order a hearing to determine the relative rights of Thurston and

the Railway Company, and upon the record thus made your office correctly affirmed the action of the Register and Receiver.

“However, accompanying the appeal to the Department is the affidavit of Thurston, corroborated by two witnesses, in which it is alleged that he has been acquainted with the land involved for the past ten years; that it was first settled upon within his knowledge in the year 1901 by Alfred Small, who built a cabin thereon and made other small improvements in the way of clearing, making trails, etc., and who resided on and occupied the land until March 1902, when he transferred his improvements and claim to Daniel O'Donnell, who immediately upon acquiring possession commenced his residence on the land and continued to occupy it until the fall of 1906, when he conveyed all of his right and title to the land, together with the improvements thereon, to appellant; that during the period of his occupancy of the land Daniel O'Donnell was qualified to make homestead entry, and occupied the land with the view of making such entry. That appellant established his residence on the land in December, 1906, since which time he has lived there continually—the improvements on the land at the present date being worth the sum of \$2,000; that he was at all times up to February 6th, 1907, the day of the filing of the plat of the township in the local office, entirely ignorant of the fact that the Railway Company was claiming the land

in any way; that on May 9th, 1902, the date of the filing of the Company's selection, the land was actually occupied and improved, and such occupancy and improvements were readily discernible by the most casual inspection.

"While the action of your office as above stated was correct upon the record as made it would seem from the allegations contained in the affidavit accompanying the appeal, that the appellant is entitled to a hearing in order that he may be afforded an opportunity of proving the allegations made by him; because if as a matter of fact the land was occupied by a qualified settler at the date of the Company's selection such land was not subject to selection."

The Hon. Commissioner of the General Land Office in his said letter "F" of April 1st, 1910, instructed this office as follows:

"You will therefore appoint a day for a hearing with notice to the parties in interest to appear, with their witnesses to prove the status of the land upon May 9th, 1902, the date of the Company's selection."

In pursuance of said instructions on April 12th, 1910, a hearing was ordered to be had before the Register and Receiver of this office on the 24th day of May, 1910, at the [132] hour of 10:00 o'clock A. M., notice of which said hearing was duly served by registered mail on Thomas R. Benton, attorney for the said Railway Company, and on Edward M. Comyns, attorney for said homestead applicant. At the time set for said hearing, to wit, May 24th,

1910, at 10:00 o'clock A. M., the said homestead applicant appeared in person, together with his said attorney, Edward M. Comyns, the said St. Paul, Minneapolis & Manitoba Railway Company failing in all ways to appear, whereupon, on motion of counsel for said Thurston, a default was entered against said Railway Company; whereupon said homestead applicant introduced the testimony of sundry witnesses in support of his claim to the land as shown by the record of the Contest Clerk filed herein, from which said evidence it fully and satisfactorily appears that on May 9th, 1902, the land in controversy was occupied by a qualified settler, at the date of the Company's selection. We therefore find and decide that the aforesaid selection of said Railway Company of the lands above described should be cancelled, and that the homestead application of the said John W. Thurston for the land in question should be allowed, and we so recommend.

Dated at Seattle, Washington, this 24th day of May, 1910.

J. HENRY SMITH,
Register.

T. R. TWITCHELL,
Receiver. [133]

THE DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
Seattle, Washington.
CONTEST No. 101.

JOHN W. THURSTON

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY COMPANY.

Involving: SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 1; E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and
NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 12, T. 39 N., R. 6 E. Seattle,
Serial No. 01662.

Now on this 24th day of May, 1910, at the hour of 10:00 o'clock A. M., being the time set for the hearing of the above-entitled case, as authorized by the Honorable Commissioner's letter "F" of April 1st, 1910, the homestead applicant, John W. Thurston, appearing in person and by his attorney, Edward M. Comyns, the St. Paul, Minneapolis & Manitoba Railway Company, lieu selector, not appearing, and it appearing from the evidence on file in this case that the said Railway Company has been duly and regularly served by registered mail of the time and the place of this hearing, on motion of counsel for said homestead applicant,

IT IS HEREBY ORDERED that a default be, and the same is hereby, entered against the said St. Paul, Minneapolis & Manitoba Railway Company, whereupon, on application of counsel for said homestead applicant, the following proceedings were had

and evidence introduced for and on behalf of the said John W. Thurston;

All of said witnesses, after being first cautioned with regard to their testimony, were duly sworn by the Register to testify to the truth, the whole truth and nothing but the truth in the above case.

JOHN R. SMITH, a witness called in behalf of the homestead applicant, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined as follows:

Direct Examination by Mr. COMYNS.

Q. State your full name, Mr. Smith.

A. John R. or John Robert Smith.

Q. Where do you reside, Mr. Smith?

A. At Sumas, Whatcom County, this state.

[134]

Q. What has been your occupation, Mr. Smith?

A. I have been employed in the Forest Service Department as a ranger.

Q. And for what length of time?

A. Since 1900 up to the first of this year in March.

Q. From 1900 to March, 1910? A. Yes, sir.

Q. In what district?

A. I was in the Mt. Baker District.

Q. Does that embrace any portion of Township 39 North, Range 6 East?

A. It did at that time but it doesn't at the present time.

Q. And what period was this that embraced any

portion of Township 39 North, Range 6 East in the Forest Reserve? A. In 1903.

Q. Were you acquainted with the North half of the Northwest quarter, the Southeast quarter of the Northwest quarter, and the Northeast quarter of the Southwest quarter of Section 12, Township 39 North, Range 6 East?

A. Yes, sir, I have been over the ground several times.

Q. And when were you first there, Mr. Smith?

A. I was first there in 1901.

Q. In 1901? A. Yes, sir.

Q. And do you recollect what part of the year?

A. It was in the summer of 1901.

Q. You stated that you were on the land in 1901?

A. Yes, sir.

Q. Do you recall about the time of the year?

A. In the summer season, I should judge about June.

Q. What was the condition of the land at that time relative to improvements or lack of them?

A. I saw no improvements.

Q. None at all? [135]

A. No, sir.

Q. When were you next on the land, Mr. Smith?

A. In the spring of 1902.

Q. Was it prior to May 9th, 1902, or subsequent to that? A. It was prior; it was in March.

Q. In March, 1902? A. Yes.

Q. And what did you find there in the way of improvements on that date?

A. I saw a cabin; that is, a part of a cabin; just the body, some logs put together.

Q. And upon what particular forty acre tract was that cabin?

A. The northeast of the northwest, I think. I ain't sure about it.

Q. And was there anything else in the way of improvements that you saw at that time?

A. Some slashing had been done and some logs cut in front and piled up in a little pile.

Q. Did it bear evidence of having been recently placed there, or did it appear to have been there a long while?

A. It appeared to be new at that time.

Q. And was it a cabin in course of construction?

A. It was a cabin in course of construction; a log cabin.

Q. Did you ascertain whose cabin it was, or who was doing the work?

A. I understood at the time who it was. There was no one present at that time.

Q. When were you there again after March, 1902?

A. Well, I was there the same month, in March, 1902; I was there later and about the first of April.

Q. And did you notice any difference in the improvements? A. Yes, sir.

Q. What difference did you note?

A. The cabin was completed.

Q. The cabin was completed? [136]

A. Yes, sir.

By the REGISTER.—In 1902? A. Yes, sir.

Mr. COMYNS.—The latter part of March 1902.

Q. What did it consist of?

A. Cooking utensils, coffeepot and frying-pan and a small stove and small articles of cooking utensils, and some tools there for working; a mattock and axe, etc.

Q. Do you know who had constructed the cabin or to whom it belonged?

A. There was a notice posted on the door of the cabin.

Q. Do you recall what that notice contained?

A. It contained a description of the land and the time it was settled, but I don't remember the description particularly or the date of settling.

Q. And how was it signed? Who was it signed by? A. By Jack Thurston, or John Thurston.

Q. Now, I will ask you whether there was any trails leading in to the land?

A. There was a trail.

Q. Was that the only trail that gave access to this tract?

A. It was to this particular part of the tract; yes, the only trail.

Q. Not to anyone coming in on that trail would these improvements be readily visible?

A. They would.

Q. It would be impossible to miss them, would it, if a person came in over that trail?

A. No, you couldn't miss them; you couldn't pass them on that trail; no.

Q. When were you there next after March, 1902?

A. I was there in 1903.

Q. And were the same improvements existant at that time? [137]

A. Oh, yes. I will tell you. I have got some things mixed here now; it has been so long ago. What name did I say was on it?

Mr. COMYNS.—Thurston.

WITNESS.—It was O'Donnell. Not Thurston then.

By the REGISTER.—Do you wish to correct your testimony in relation to the notice? Do you wish to correct it? A. Yes, sir.

By the REGISTER.—You may do so.

A. The name was Dan O'Donnell, Mr. Thurston coming in afterwards. I have got them mixed up, being so long ago.

Q. You were there then in the month of March, 1902, twice?

A. Yes, I went up there about the latter part of March.

Q. Then again in 1903? A. Yes, sir.

Q. And you saw the cabin in the latter part of March, and also in 1903? A. Yes, sir.

Q. How was it furnished in 1903?

A. Nothing seemed to be removed. There was everything there.

Q. Did it bear evidence of being occupied?

A. Yes.

Q. I will ask you then if this land was vacant, unoccupied land in any sense in May, 1902?

A. It was; so far as my knowledge went there were no other claimants.

Q. But it was claimed in the month of May, 1902? A. Yes, yes. Nothing prior to that time.

Q. What would you say would be a reasonable value to put upon such improvements as you saw there? A. This cabin?

Q. Yes, and such clearing as there was?

A. Not a great deal. I would say \$150, not taking into consideration the trail.

Witness excused. [138]

ALFRED SMALL was next called as a witness, and being first duly sworn, testified as follows:

Direct Examination by Mr. COMYNS.

Q. Where do you reside. A. At Wickersham.

Q. And what's your business? A. Logger.

Q. Are you acquainted with the tract now embraced in the homestead of John W. Thurston in Section 12? A. Yes, sir.

Q. How long have you been acquainted with that tract of land?

A. Since the latter part of August, 1901.

Q. What was its condition on that date?

A. It was wild.

Q. It was wild? A. Yes, sir.

Q. When did you again visit it after August, 1901?

A. I was there for about eight or nine days straight that time working.

Q. In the latter part of August? A. Yes, sir.

Q. What were you doing there?

A. Building a trail and making preparations for building a cabin.

Q. For what purpose was you building the trail and doing the work you have just stated?

A. I was hired to do it.

Q. By whom? A. C. C. Cole.

Q. Did you do any other work in the fall of 1901?

A. I laid the cabin up about three logs high.

Q. When were you there again?

A. I was there on or about the 20th of November the same year.

Q. And what did you do on that occasion? [139]

A. I went up there to work for Mr. O'Donnell.

Q. Did you do any work on the place at that time?

A. Not at that time.

Q. When did you again do any work, if at all?

A. The last work I done on the claim was along about the 12th of October.

Q. The same year? A. The same year.

Q. What other work did you do then?

A. I laid up one more log and took my tools down off the claim.

Q. And when were you again on the claim?

A. The last time was in February, 1902; along about February.

Q. February 1903 or 2? A. 1902.

Q. And did you do any work then?

A. No, sir; the cabin was completed.

Q. Did you see anyone complete the cabin?

A. I didn't see anyone complete the cabin.

Q. That was the same cabin you started in the fall of 1901? A. Yes, sir.

Q. Describe its size and construction as it was completed?

A. It was made out of split logs and was standard requirements, size 14x15; the logs were split and were about 18x24 on the butts and dovetailed together; then the sides were made out of split shakes and the roof was made out of split shakes.

Q. Were there any doors or windows in it?

A. Yes, sir.

A. Yes, sir, there were doors and windows in it.

Q. Was that a comfortable cabin as it existed in March, 1902? A. Yes, sir.

Q. Was it furnished at that time?

A. It was furnished very comfortably for a home-stead.

Q. And who was occupying the cabin at that time?
[140]

A. Dan O'Donnell.

Q. Was there anything else in the way of improvements in the month of March, 1902, except this cabin?

A. There had been trees slashed away, trees that were in danger of falling on the cabin.

Q. And they would cover what area?

A. I should judge about one-half of an acre.

Q. Was there anything additional in the way of trail work? A. Yes, sir.

Q. Was there a trail leading to the cabin?

A. Yes, sir, leading to the cabin from the County Road.

Q. When were you there again, Mr. Small, if at all? A. Along in July right after the Fourth.

Q. That was in July, 1902? A. In July, 1902.

Q. Who was occupying the cabin then, if anyone.

A. O'Donnell.

Q. And what was its condition? A. Habitable.

Q. Did the cabin bear evidence of continuous occupation between March and July, 1902?

A. Yes, sir, it bore such evidence.

Q. You say you were employed by Mr. Cole?

A. Yes, sir.

Q. To build the cabin? A. Yes, sir.

Q. But Mr. Cole never occupied the cabin?

A. No, sir; he never did.

Q. How did Mr. O'Donnell secure possession of it, do you know?

A. He bought the improvements Mr. Cole had done.

Q. Bought them during the course of construction? A. Yes, sir.

Q. Do you know what he paid Mr. Cole?

A. As near as I can remember, one hundred dollars. [141]

(By the REGISTER.)

Q. Do you claim to be a settler on the land at that time, in 1901?

A. No, sir; I was not a settler. I was working there for another man.

Q. Who was the party for whom you made the improvements? A. C. C. Cole.

Q. Cole was then the first settler on the land?

A. Cole was the original locator.

Q. And at what time did he make his settlement?

A. He made his settlement as near as I can remember in July, 1901.

Q. Did he established a residence at that time?

A. He established a residence, but he lived on the section line north of there; he didn't live in that cabin.

Q. Did he claim other lands in another section north? A. No; no other lands.

Q. Was his residence on the section line north made with the intention of retaining this land?

A. Yes, sir.

Q. And did he at that time suppose himself to be on this particular tract when he made his residence there?

A. He was just stopping there while I was doing this work for him—building this cabin; just a stopping place.

Q. Did he ever establish a residence in this cabin you built on this tract?

A. No, sir, he transferred the work I done to O'Donnell before it was completed.

Q. Did he intend to be a settler? A. Yes, sir.

Q. He made these improvements for himself intending to become a settler?

A. Yes, sir, for himself.

Q. Was it his intention to take the land as a homestead? A. Yes, sir.

Q. And it was for that purpose these improvements and settlement [142] and work was done?

A. Yes, sir.

Q. With a view to making a settlement on the land? A. Yes, sir; a settlement.

Q. What was his occupation?

A. He was a teamster, driving team; and he had contracted to haul shingle bolts for a man down—I forget the name of the man he was working for.

Q. And what was the date he made the sale to O'Donnell? About what time?

A. It was some time in the latter part of August or first of September, 1901.

Q. 1901? A. 1901; yes.

Q. Do you know anything about whether O'Donnell took possession of the improvements at the time of that transfer? A. Yes, sir, he took possession.

Q. Did he establish a residence on the land?

A. Yes, sir, he made it his stopping place.

Q. And how long did he live there?

A. I do not know.

Q. Do you know anything about the transfer from him to somebody else—from O'Donnell to some other person?

A. I know there was a transfer made to someone, but the circumstances I don't know nothing about at all.

Q. Do you know when the present claimant took possession of the improvements?

A. I don't know the exact date but I know the year.

Q. What year? A. 1906.

Witness excused. [143]

HERMAN STEINER, being next called as a witness on behalf of claimant, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined as follows:

Direct Examination by Mr. COMYNS.

Q. Where do you reside, Mr. Steiner?

A. At Maple Falls.

Q. What is your occupation? A. Farmer.

Q. Are you acquainted with that tract of land embraced in the homestead application of Mr. John Thurston located in Section 12, Township 39 North, Range 6 East? A. Yes, sir.

Q. How long have you been acquainted with that tract of land?

A. I have known it for about fifteen years.

Q. Were you on that land prior to May, 1902?

A. Yes, sir.

Q. Upon what date immediately prior to that date were you on the land?

A. I was there in the fall of 1901, and early in the spring of 1902, February or March.

Q. What was the condition of the land in 1901 when you visited it?

A. There was a log cabin started.

Q. And when were you there in 1902?

A. Either February or March; I don't remember which.

Q. What was the condition of the land at the time you visited it at that time?

A. There was a cabin built on the land.

Q. What kind of a cabin was this?

A. A log cabin, I should judge 14x16, the size of it.

Q. Built of cedar logs? A. Yes.

Q. Was it furnished to any extent?

A. Yes, sir, a good stove in it, cooking utensils and a bed. [144]

Q. Was anyone occupying it? A. Yes, sir.

Q. Who? A. O'Donnell; Dan O'Donnell.

Q. What was the occasion of your presence up there in February or March, 1902?

A. I helped to build the cabin.

Q. Did you do any other work around the place?

A. I done a little clearing around.

Q. What was the extent of that clearing or slashing, in 1902?

A. I think about a quarter of an acre; something like that.

Q. And directly upon the completion of the cabin was it furnished by Mr. O'Donnell? A. Yes, sir.

Q. Did you help furnish it, or do anything in that line?

A. Yes, I helped pack a cook-stove up there.

Q. Was there anything in the way of trail work in March, 1902? A. Yes, the trail was built.

Q. When were you there again?

A. About a year later.

Q. Were the same improvements on the land?

A. Yes, sir.

Q. Did Mr. O'Donnell still occupy the cabin?

A. I suppose so. I didn't go in the cabin. I

seen the cabin from a distance, but I didn't go in there.

Q. Did you take note of any notices posted on the cabin or on the land when you were there in March?

A. Yes, there was a notice on the cabin door.

Q. Do you remember the contents of that notice with reference to the possession of the land?

A. That he had taken land in Section 12 as a homestead, as near as I can remember it, giving the description of the land.

Q. What did the notice contain? [145]

A. Why that he as a citizen of the United States claimed this as a homestead.

Q. Who was it signed by?

A. O'Donnell and I was a witness.

Q. Do you know who wrote that notice?

A. I and him wrote it out together.

Q. How close to the cabin were you in 1903?

A. Why I was in about 100 feet of it, or 150 feet.

Q. Did it bear evidence of having been abandoned since you saw it in March?

A. No, it didn't look like it was abandoned.

Q. Did you come along this trail that led to his cabin, did you pursue that trail in going up there in the year afterwards, in 1903? A. In 1903?

Q. Yes?

A. No, I came down through the brush. I didn't follow the trail.

Q. What would be a reasonable value to put upon such improvements as were there in March, 1902, when you left the place? A. About \$150, I think.

Witness excused.

DAN O'DONNELL, being next called as a witness in behalf of the claimant, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined as follows:

Direct Examination by Mr. COMYNS.

Q. Where do you reside, Mr. O'Donnell?

A. At Lawrence at present.

Q. And what's your business?

A. Working in the logging camps.

Q. Where did you reside in 1901?

A. At Maple Falls. I had charge of a mine.

Q. Are you acquainted with the North half of the Northwest quarter, the Southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 12, township 39 north range 6 east? [146] A. Yes, sir.

Q. When were you first on that land, Mr. O'Donnell? A. When did I first go on there?

Q. Yes?

A. Near about—I can't give the exact date,—but it was in August either the last or near about the first of September, 1901.

Q. 1901? A. Yes, sir.

Q. And what was the occasion of your presence on that land, how did you come to be there?

A. I was looking for a homestead and I happened up that way.

Q. Just go on and state how you acquired that homestead, if you did acquire it?

A. It was through my father that I was informed

a squatter wanted to sell his right, as you would call it, I suppose.

Q. What was the name of the squatter?

A. Why Mr. Cole was the name. So, I went up to see him, and I looked the claim over and I paid him one hundred dollars for the location fees. He had a trail in there and had started a cabin.

Q. And what did you do then?

A. Why I started to work on the cabin. I was back and forth; every little spare time I could get I would go out there and do a little work. Of course, it was a little inconvenient to get in there, but I worked on the place the best I could.

Q. When was the cabin completed?

A. Near about in March, as near as I can judge, 1902.

Q. And did you furnish it?

A. I bought a little supplies and took in there; a stove and stuff I bought at Maple Falls; a bachelor's outfit.

Q. Did you post any notices indicating what land was claimed by you? A. Yes, sir. [147]

Q. And was that the same land I described to you? A. Yes, sir.

Q. Were you occupying that land in the month of May, 1902? A. Yes, sir.

Q. On May 9th, 1902? A. Yes, sir.

Q. The date the St. Paul, Minneapolis & Manitoba attempted this selection?

A. Yes, sir. I was on there before they ever selected. I was right on the trail between the hills there.

Q. Then your claim had attached in May, 1902?

A. Yes, sir.

Q. And the land was in no sense unoccupied land on that date? A. Yes, sir.

Q. Was there anyone else claiming it outside of yourself? A. No, sir.

Q. Were there any cabins on any of the other forties claimed by you?

A. No, sir, I was all over the land. Me and other parties that appeared there.

Q. What was the value of the improvements that were there on that land on the 9th day of May, 1902?

A. Well, do you mean what it cost me for what I had in the cabin and all?

Q. Yes, put it all together, figuring your own labor and the labor of anyone that helped you?

A. \$150 for the cabin.

Q. And it had cost you that up to May, 1902?

A. Yes, sir.

Q. Now, you did some trail work there, didn't you? A. Yes.

Q. Were these improvements readily discernible to anyone making an examination of this claim?

A. Yes. [148]

Q. And was this trail that led up to your cabin the only trail on your land? A. The only one.

Q. Was that the only one in May, 1902?

A. Yes, sir.

Q. When, if at all, did you convey these improvements to anyone else? A. I don't—

Q. When did you convey your improvements to

anyone else, if you did so convey them? When did you sell your improvements to anyone?

A. I didn't sell my improvements.

Q. Subsequently did you not sell out?

A. No.

Q. Why, isn't it a fact that your turned over your improvements to Mr. Thurston?

A. But that was later.

Q. That is what I am speaking of, later; I don't mean at that time? A. Sure.

Q. What time was that; what time did Mr. Thurston take possession?

A. I would judge it would be—I can't exactly state.

Q. Well, it was several years later than 1902?

A. Yes, several years afterwards. It was along in the Spring, I judge, about a year or two later.

Witness excused.

HERBERT E. LEAVITT, a witness called in behalf of the homestead applicant, being first duly sworn by the Register to testify the truth, the whole truth and nothing but the truth, was examined as follows:

Q. Where do you reside, Mr. Leavitt?

A. At Maple Falls.

Q. What is your occupation?

A. Blacksmith and rancher. [149]

Q. Are you acquainted with the tract of land as embraced in Mr. Thurston's homestead application?

A. Somewhat; yes.

Q. When were you on that land, if at all?

A. I have been on it twice. I was on it in 1901 and 1902.

Q. About what part of the year 1901 were you on it?

A. In October about the 26th or 7th; somewhere along there.

Q. And what was the condition of that land at that time?

A. Somebody had started a foundation for a cabin in there, that I saw when I came through there.

Q. And about what time in 1902 were you on it?

A. That was just shortly after I sold out the hotel there. I went up there on a little hunting excursion and I camped there on the 9th of May.

Q. Then you went in there on the 9th of May and came out the 10th? Camped there the night of the 9th? A. Yes, sir.

Q. How do you fix that date, Mr. Leavitt?

A. It was just after I sold my hotel, my business, to Jones.

Q. You ran a hotel there at that time?

A. I ran a hotel there and I sold out to Mr. Jones.

Q. And immediately after selling out your hotel you went up there as you have stated?

A. Yes, sir.

Q. Who was with you, if anyone, at that time?

A. Percy McDonald.

Q. Were you in the cabin on the 9th day of May?

A. I was in the cabin on the 10th. We went in there and camped on the 9th just a few rods from the cabin, but we did not see the cabin; we didn't

know it was there until the next morning, when we ran on to it.

Q. You didn't see the cabin then on the 9th?

A. No, in the morning of the 10th we ran on to it and found we had [150] been camped only a little ways from it.

Q. Just describe that cabin as you found it there on May 10th, 1902.

A. The cabin was finished up and looked like somebody was occupying it. There was coffee there, and beans and such like; cooking utensils and such things in the cabin; a little cooking stove, and some bunks.

Q. Did it bear evidence of having been recently occupied?

A. Yes. Everything looked fresh; looked new in the cabin.

Q. What did you note in the way of slashing about the cabin?

A. There was a little slashing around there.

Q. What would you say the extent of it was?

A. I couldn't say exactly what the extent of it was; it was just slashed out around the cabin a little.

Q. Did you see any notice posted indicating who occupied the cabin?

A. There was a notice on the tree that said Dan O'Donnell.

Q. There was a notice on the tree?

A. There was a notice tacked on the tree.

Q. Describing the particular tract that was claimed by the homestead applicant?

A. I didn't pay very much attention to it, you know; I just happened to look at it and seen his name was on it.

Witness excused.

* * * * *

JOHN W. THURSTON, the homestead applicant, being next called in his own behalf, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined as follows:

Direct Examination by Mr. COMYNS.

Q. You are the homestead applicant for the land that is involved in this case in Section 12, Mr. Thurston? A. Yes, sir.

Q. When did you first become acquainted with that land?

A. In the fall of 1901 between July and Christmas. [151]

Q. And what was the condition of that land at that time?

A. I was up looking timber over and I ran across a trail and a small improvement started as a cabin.

Q. Do you know to whom this improvement belonged?

A. Only by inquiring. I inquired when I came back and it was stated to me that Mr. Small had done the work.

Q. That Mr. Small had done the work?

A. Yes.

Q. And was that how you came to make affidavit that those improvements were done by Mr. Small?

A. I understood he did the work there and that he was going to take it as a homestead.

Q. Now when were you there again?

A. I was there again between January and April, 1902. There was snow on the ground.

Q. Describe the improvements at that time.

A. I went up the same trail and across the same section and the cabin was completed and this man O'Donnell was living there.

Q. O'Donnell was living there? A. Yes.

Q. Now how far from this land were you living at that time?

A. About five miles; four and a half.

Q. That was in the year 1902? A. Yes.

Q. And have you lived there ever since?

A. Yes, sir.

Q. Well between 1902 and 1906 where were you living?

A. In 1904 I went up to Warnick, and that is just about a mile and a half from this same piece of land; it is a railroad station.

Q. Do you know who was living on this land between the interval elapsing between the time you first saw it and 1902? A. Mr. O'Donnell.

Q. What was the value of those improvements that were there in 1902, a rough estimate? [152]

A. Oh, I don't think a man could put them in there for less than \$200, I guess, if he would hire it done he couldn't; hire it put in there.

Q. Then you knew the land in May, 1902?

A. Yes, sir.

Q. And was that land unoccupied vacant land at that time?

A. Well, Mr. O'Donnell had that homestead.

Q. Mr. O'Donnell was occupying it?

A. He was occupying it, yes.

Q. When did you acquire any title to this land, any claim to it, Mr. Thurston, and by what process?

A. I was living a mile or so down there, and I found out I had better take my homestead right and use it, and so I went to O'Donnell and I says to him, what would he take for his improvements he had got up there, and says, "I don't know." I says, "If you don't sell out somebody is going to jump you on this continued residence proposition"; and he says, "I know it, but it's pretty hard for me to live up there and have to work, too." So I says, "I will give you a hundred dollars for your improvements and go ahead with the work and make it my home, because I am going in there some place"; and he says, "All right"; and I paid him the money and took a receipt.

Q. When was that?

A. The receipt shows that. I think it was March 26th, 1902.

Q. Is that the receipt which you received from him? A. Yes, sir.

Q. Refreshing your memory from that receipt, what date did the transfer occur?

A. October 22d, 1906. I rode out there in a hurry and asked him for a receipt for my money, and he gave me that.

Q. Now, Mr. O'Donnell was working in the vicin-

ity of the land during all those times, was he, freighting there?

A. Yes, freighting there, and he did most of the time. [153]

Q. Now, when did you take up your residence on the land?

A. That same fall; being a quarter of a mile back from there I drops one forty and takes another forty, and I takes my improvements and puts them down on another forty. I didn't want to move my children and family up in the cabin, so I put up a cabin there.

Q. What was the date you took up your actual residence on the land?

A. December 11th, 1906. That is when we moved in; that is the residence I claim.

Q. What improvements did you put upon the land?

A. I have kept improving it since 1906. The first thing, I raised the foundation and put in a seven-room house; it cost me \$750 for the house the first thing.

Q. Of what is the house built?

A. Of No. 1 lumber.

Q. Dressed lumber?

A. Dressed lumber shingled outside; a good plastered house; every convenience in it; hot and cold water and all conveniences you can find in any house; trimmings; etc.

Q. Completely furnished? A. Yes, sir.

Q. What does your family consist of?

A. My wife and three children.

Q. What improvements outside of the house have you put upon the land?

A. I have a barn that cost me \$250 the first thing for carpenter work.

Q. Is that also made of dressed lumber?

A. Just sawed lumber, and thirty dollars worth of shingles on the roof; best No. 1 shingles.

Q. Have you anything else in the way of buildings on the place?

A. Chicken-house; my wife is in the chicken business.

Q. In the chicken business? A. Yes.

Q. What have you got in the way of clearing and slashing? [154]

A. I have about six acres slashed. We were afraid of fires and I slashed that for that reason; but I have about three acres under cultivation. I have never stepped it off, but I would call it three acres.

Q. Is that three acres completely cleared, the stumps off it?

A. Completely cleared and stumped; not a stump on it; and the ground is so soft that I hired a man and we spaded it up; just spaded it up; hired a man and I done lots of the spading in the garden myself.

Q. Anything in the way of fencing?

A. Yes, I have all this cultivated land fenced in on account of stock.

Q. Do you keep anything in the way of stock?

A. Five head.

Q. What else have you on the place?

A. Several horses and buggies; have several of them.

Q. Any farming implements?

A. Yes; farming implements. What I need to cultivate this land.

Q. Any chickens?

A. Yes, a lot of them; about 75 or 100, I guess; haven't we, Wife? I don't know how many; we sold off a lot of them.

Q. What would be the reasonable value of these improvements?

A. Oh, I guess about \$2,500 to the present date.

Q. Since you settled there in December, 1906, for what periods have you been absent?

A. I don't believe we have been off a minute. When we were down here the children were at home; we have a housekeeper there.

Q. So from the time you went on there to occupy the land in December, 1906, you have resided there continuously until the present time? A. Yes, sir.

Q. And at no time has the house been left alone?

A. No, it never has been left alone.

Q. When did you file your application? [155]

A. That was February 6th, 1907, the time the land was opened for entry and the plat went on file.

Witness excused.

Case closed.

* * * * *

State of Washington,
County of King,—ss.

Lois B. Greene, being first duly sworn, says:

That the foregoing is a true and complete transcript of the shorthand notes of the testimony in the above-entitled case, as the same was reported by her when given by the several witnesses.

LOIS B. GREENE.

Subscribed and sworn to before me this 6th day of June, A. D. 1910.

E. F. GREENE,

Notary Public in and for the State of Washington,
Residing at Seattle. [156]

THE DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

JOHN W. THURSTON

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY COMPANY.

INVOLVING the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$,
Section 12, Township 39 North, Range 6 East,
Seattle Land District, Washington.

Now comes the St. Paul, Minneapolis & Manitoba Railway Company and appeals to the Honorable Commissioner of the General Land Office, from the decision of the Register and Receiver of the United States Land Office, at Seattle, Washington, bearing date May 24th, 1910, notice of which was served upon said Railway Company by letter from the Register of the said land office, dated June 16th, 1910.

Appellant alleges that the Register and Receiver in their said decision erred:

1. In holding and deciding that appellant's selection of the land in controversy was invalid for the reason that said land was occupied by a qualified settler at the date of said selection.

2. In holding appellant's selection of said land for cancellation.

The land in question was selected by appellant railway company on May 9th, 1902, under the Act of Congress of August 5th, 1892. The plat of the survey of said land was filed in the district land office on February 6th, 1907, and within the time allowed for that purpose said railway company duly filed in said office its supplemental selection list adjusting its original selection to the lines of the Government Survey, which supplemental list was thereupon accepted and approved by the district land office.

On February 6th, 1906, John W. Thurston filed an application [157] to enter the lands in controversy, with other lands, under the Homestead Law, alleging settlement thereon December 12th, 1906. His application was rejected for conflict with the railway company's selection whereupon he appealed to the Commissioner of the General Land Office by whom the decision of the Register and Receiver was confirmed. He thereupon further appealed to the Secretary of the Interior, alleging that during the year of 1901 Alfred Small settled upon the land in controversy, built a cabin thereon and made other improvements; that during the

month of March, 1902, Small transferred his improvements and claim to one Daniel O'Donnell, who at once commenced his residence on said land and continued to occupy the same until the fall of 1906, when he conveyed all his right, title and interest therein to the claimant, John W. Thurston.

On March 19th, 1910, the Secretary of the Interior modified the decision of the Commissioner of the General Land Office and directed that a hearing be ordered in order to afford Thurston an opportunity to show that the land in controversy was occupied by a qualified settler at the date of the selection thereof of the railway company.

The hearing so directed was duly ordered and held, and upon the record made thereat the Register and Receiver held and decided that at the time of the railway company's selection of said land the same was occupied by a qualified settler and that the railway company's selection was, for that reason, invalid and should be canceled.

Neither Small nor O'Donnell ever filed a homestead application for said land in the United States Land Office and I do not understand that it is so claimed. It is not claimed that Thurston settled upon the land in controversy earlier than December 12th, 1906, more than four years after the Railway Company's selection thereof. His claim, if any, therefore, must be supported upon the proposition that the mere occupation of the land in controversy by a qualified settler who never asserted a right to the land by filing a claim in [158] the United

States Land Office is a bar to a selection under the Act of 1892.

The Act of August 5th, 1892, 27 Stat. 390, grants to the St. Paul, Minneapolis & Manitoba Railway Company the right to select in lieu of certain lands relinquished by it to the United States, "an equal quantity of nonmineral public lands, * * * not reserved and *to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection.*"

The only question in the case, therefore, is—"Had an adverse right of claim to land in controversy attached or been initiated at the time of the railway company selection thereof?"

The Supreme Court of the United States by a long line decision has established that an adverse right or claim does not attach nor is it initiated by mere settlement or occupation of the land; that notice of the claim to the United States Land Officers is indispensably necessary to give the claimant any standing and that his settlement alone is not sufficient for that purpose.

Lansdale vs. Daniels, 100 U. S. 113.

The case of Water & Mining Co. vs. Bugsby, 6 Otto, 165, involves the construction of the Act of Congress granting sections 16 and 36 in each township to the State of California, which Act provided that where any settlement should be made upon any such section before the same was surveyed, other land should be selected in lieu thereof by the State. It was claimed that the land involved was embraced in a pre-emption settlement existing at

the time of survey and was for that reason excepted from the grant to the State. But the Court held that the settler was under no obligation to assert his claim and he having abandoned it, the title of the State became absolute as of the date the survey was completed.

Railway Company vs. Dunmeyer, 113 U. S. 629, involves the construction of the Kansas Pacific Railway Company, which Act granted the odd numbered sections within specified limits, "not [159] sold reserved * * * and to which a pre-emption or homestead claim may not have attached at the time the line of said road was definitely fixed."

The land in dispute was embraced in an existing homestead entry at the time the line of the road was definitely fixed. It was claimed, however, that the homesteader had abandoned his claim and that, for that reason, his homestead claim had not attached. Discussing this claim the Court said:

"Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated."

The case of *Buxton vs. Traver*, 130 U. S. 232, is particularly in point. Traver settled upon unsurveyed land in the State of California, but died before the survey thereof, and, consequently, without filing his pre-emption declaratory statement in the

United States Land Office. After the survey of the land his widow filed a declaratory statement, made the proofs required by law and received a patent for the land. Traver's daughters, and heirs, commenced an action against the widow to establish an interest in the land, claiming that Traver, by his occupation of the land, acquired a right of pre-emption therein, and that they, as his heirs, were equally entitled, with the widow, to an interest in said land. The Court held that as Traver never filed his declaratory statement, his right of pre-emption never attached to the land. The Court said:

“The United States make no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him,—If you wish to settle upon a portion of the public land and purchase the title, you can occupy any unsurveyed lands which are vacant and have not been reserved from sale; when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them. *If those steps are, from any cause, not taken, the proffer of the Government has not been accepted and a title in the occupant is not even initiated.*”

And speaking of the claim of the plaintiff as heirs of Traver, the Court said:

“What we have said as to the legal effect of deceased's occupation and improvement shows

that no title was initiated or [160] right of pre-emption created by them, and, of course, nothing was left by the deceased to be completed by his heirs."

This case conclusively establishes that the right of pre-emption is not created or attached or even initiated by mere settlement and occupation of the land. The fact that the case arose under the pre-emption law, while the claims of the settlers involved in this controversy must rest upon the homestead law is immaterial, as the right of the homestead claimant to settle upon unsurveyed lands as these were, rests upon the Act of May 14th, 1880, which allows such settler the same time to file his homestead application and perfect his entry as was then allowed to settlers under the pre-emption laws. Further the Supreme Court of the United States, in *Tarpey vs. Madsen*, 178 U. S. 215, held that in respect to the necessity of filing the claim in the United States Land Office pre-emption and homestead claimants stand upon the same footing.

The case of *Gonsales vs. French*, 164 U. S. 338, involves the construction of the Act of Congress reserving land in the Territory of Arizona for the purpose of being granted to the future state to be erected out of the same. It was claimed that certain settlements existing at the time of the survey excepted the land from the grant. The Court held, however, that mere possession and occupation of the land did not prevent the rights of the territory from attaching thereto. The Court said:

“The claim of the plaintiff in error, therefore, to a right of pre-emption was fatally defective because her vendors and predecessors in title had failed to make or file an actual entry in the proper land office. As they did not choose to assert their right by filing declaratory statement or by making an entry as pre-emptioners their mere possession did not prevent the rights of the territory from attaching to the school section when the survey was made. Nor did the plaintiff in error lawfully succeed to any possessory rights they may have had, as against the United States because such rights were merely personal to the settler and under U. S. Rev. Stat. 2263, were not assignable to the plaintiff in error.”

The case of *N. P. Ry. Co. vs. Colburn* involved the construction of the grant made to said railway company by act of July 2d, 1864. It was claimed that the occupation of the land by a qualified settler at the time the line of the company's road was definitely [161] located excepted the land from the railroad grant. This claim the Court rejected and held that no pre-emption or homestead claim attaches to a tract of land until an entry thereof in the local land office.

In *Tarpey vs. Madsen*, 178 U. S. 215, which involved the construction of the grant to the Union Pacific Ry. Co., the Court held that the mere occupation and possession of a claimant who does not file his declaratory statement is insufficient to protect his claim against a land grant. The Court

cited with approval its decision in the N. P. Ry. Co. vs. Colburn, *supra*, and said that they had therein distinctly held that no mere occupation of a tract of public land in and of itself excepted the tract from the operation of a railroad grant and that a settler could not dispute the claim of a railroad company until and unless he had filed his entry in the proper land office.

These decisions clearly establish that no adverse right or claim to the land in controversy herein had attached or been initiated at the time of the railway company's selection thereof, and that neither Small nor O'Donnell could, in view of their failure to file their claims in the district land office, dispute the claim of the railway company. This being so, it necessarily follows that Thurston, a third party, whose claim, if any, was not initiated until long after the right of the railway company had attached by its selection of the land, cannot dispute the claim of the railway company and assert in the former occupants a claim that they themselves never saw fit to assert.

That many of the cases cited relate to place lands so-called is immaterial. In such case if a pre-emption or homestead right or claim had attached to the land at the time the line of the railroad was definitely located such land was excepted from the grant. If such a claim had not attached, the land was subject to the grant and passed thereunder. By the act of August 5th, 1892, the right of selection is extended to lands to which an adverse right or claim had [162] not attached or been initiated at

the time of selection. The principle is the same in both cases. If no adverse right or claim has attached or been initiated, the land in one case passes under the grant and in the other case is subject to selection.

The case of *Donahue vs. St. P. M. & M. Ry. Co.* 210 U. S. 21, which arose under the Act of August 5th, 1892, has no bearing on the question at issue herein. In that case one Hickey was a settler upon unsurveyed land at the time the railway company selected the same. When the survey was made Hickey duly filed his claim in the District Land Office and appealed to the Commissioner from the adverse decision of the District Land Officers. A hearing was ordered in the matter at which Hickey's mother and heir duly established the fact of his settlement. As the result of the contest between Hickey's heir and the railway company, the Secretary of the Interior held that Hickey's right was prior and superior to that of the railway company and that his heir would be allowed to complete his entry. His mother and heir thereupon made homestead entry which she subsequently relinquished, whereupon the land was entered by Donahue. The Court claimed that Hickey's settlement, claim and entry segregated the land from the public domain and that the same was not subject to selection by the Railway Company. It will be noted that the case was one wherein the claimant was not only in possession of the land at the time of the railway Company's selection *but that his claim was duly presented to and allowed by the officers of the Land*

Department. Any suggestion that the Court in recognizing such an entry as superior to the claim of the Railway Company under its selection, intended thereby to reverse the long line of well-considered decisions herein cited and to hold that an adverse right or claim attaches or is initiated by mere possession and occupation of the land is utterly untenable.

It is respectfully submitted, that, as neither Small nor O'Donnell ever filed in the United States District Land Office notice of their claim, their right to the land in controversy had not attached or [163] been initiated at the time of the railway company's selection. The decision appealed from should, therefore, be reversed and the land in controversy awarded to the railway company.

THOS. R. BENTON,

Attorney for the St. Paul, Minneapolis & Manitoba
Railway Company.

Dated July 18th, 1910. [164]

UNITED STATES LAND OFFICE.

CONTEST 101.

Serial 01662.

JOHN W. THURSTON

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA RY.
REPLY BRIEF.

Counsel in his argument in support of the Company's appeal asserts that "The Supreme Court of the United States by a long line of decisions has established that an adverse right or claim does not

attach nor is it initiated by mere settlement or occupation of the land; that notice of the claim to the United States Land Officers is indispensably necessary to give the claimant any standing and that his settlement alone is not sufficient for that purpose."

Counsel, apparently in support of such statement, cites certain decisions of the United States Supreme Court (100 U. S. 113, 113 U. S. 629, 130 U. S. 232, 164 U. S. 238, 179 U. S. 215, 210 U. S. 221), none of which are in point or establishes in any degree the contentions urged by counsel. On the contrary the decisions of the Courts including those cited by counsel hold that an adverse right or claim does attach and is initiated by settlement or occupation of unsurveyed land, and that no notice of the claim to the United States Land Office is necessary to give the claimant standing and that his settlement is amply sufficient for that purpose.

The reason for such ruling is readily apparent. No provision is made by law or the rules and regulations of the Department of the Interior for the recording of claims on unsurveyed land, and until the land is identified by survey, the homesteader and pre-emptor must rely upon his settlement alone as indicating to the world his claim to the land.

Even in such cases as are cited, the decisions merely hold in effect that where the lands are surveyed and the opportunity is afforded the pre-emptor or homesteader to record his [165] claim, his failure to do so within the period fixed by the laws of the Department would remove his claim from the

excepting clause of the grant. Good administration would require that the Railroad Company should upon the filing of the township plat or within a reasonable time thereafter, be advised as to the particular lands passed by the grant. Hence the reason and logic of the rule requiring the homesteader or pre-emptor to make of record his claim within a limited period after it had been made possible for him to do so.

The fact that the cases cited by counsel affecting railroad lands relate to those within the place limits is said by counsel to be immaterial. Legislation and the decisions of the Court and the Department affecting the so-called grant in place and the grant of indemnity are as divergent as the suns.

Title to land within the place limits of the grant passes without selection and approval (Howard vs. Perrin, 200 U. S. 71, 50 Law Ed.), but indemnity lands do not. No interest in lands within the indemnity limits of the grant is acquired until the selection is approved by the Sec. of the Interior (Sjoli vs. Dreshel, 199 U. S. 564, 50 Law Ed.). Railroad grants take effect *in praesenti* of public lands if location is all there is to be done to pass the land (Northern Lbr. Co. vs. O'Brien (C. C. A.), 139 F. 164, Acts 1960-61, page 136), and title passes on filing map of definite location (So. Pac. R. Co. vs. Lippman, Cal., 83 page 445), or actual construction of the road and compliance with other statutory conditions. (Ore. Short Line R. Co. vs. Quigley, 10 Idaho, 10-70, 80 page 401.)

In the matter of indemnity lands, no title equitable or otherwise, passes to the Railroad upon selection. The lands selected must on the date of the tender of the selection [166] be of the kind, character and condition provided by the grant to make it susceptible of acquisition thereunder. The validity of the list is determined by the status of the land at the time of the presentation of the said list.

Under the act of Aug. 5, 1892, the lands subject to selection by the Company are restricted to non-mineral lands, "Not reserved, and to which no adverse right or claim shall have attached, or been initiated at the time of the making of such selection." On the date of the tender of the Railroad selection an adverse right or claim had attached and been initiated. Had it been possible on the date of the tender of the company's list to establish such fact, said list would have been forthwith rejected and a subsequent change in the status of the land would not operate to revive said list. The opinion of the Hon. Sec. in case of Kern Oil Co. et al. vs. Clarke, is enlightening.

"Congress had the unquestioned power to restrict the right of selection as it chose, and could so legislate as to avoid bringing a new and probably numerous class of applicants for public lands into antagonism with settlers upon and occupants of the public lands who were there at the invitation or by the license of the government, and whose settlement or occupancy was not shown upon the land office records. There are many instances in public land legis-

lation where, in providing a new mode of disposing of public lands, Congress has been careful to avoid contests between individuals and to prevent claims under the new law from disturbing the possessory rights or imperfect claims of others." (31 L. D. 295.) [167]

"Generally speaking, land which is occupied is not subject to selection. It has not been determined that there are any exceptions." (31 L. D. 320.)

"It is clear that this land showed evidence of occupancy when the nonoccupancy affidavit, in support of the Litchfield's application was executed, and when that application was presented the occupant was yet in possession of the lands and improvements. The conditions were such as to justify your conclusion that the signs of settlement and improvement were sufficient to charge the selector with notice thereof. Under the rulings of the Department, land in the condition of this is not vacant within the purview of the act of 1897". Litchfield et al. vs. Anderson, 32 L. D. 298.)

The fact that the protestant and homestead applicant was not the occupant of the land on the date of the tender of the Company's list, which fact is urged as a reason for the reversal of the judgment of the Local Office is not material to the issue herein involved.

"The status of indemnity lands at the date of selection determines the right of the Company thereto. This is well settled by a long

line Departmental decisions (3 L. D. 51, 22 L. D. 273, 10 L. D. 504, 12 L. D. 19, 12 L. D. 535.)

“The status of a tract of land at the date of its selection determines the right of the Company thereunder; and if at such time there exists an adverse claim sufficient to bar said selection, the subsequent abandonment of said [168] adverse claim cannot inure to the benefit of the company under its selection so made. *N. P. R. R. Company vs. Loomis et al.*, 21 L. D. 395.”

“The right of a railroad company to take a tract of land as indemnity must be determined by the status of such tract at the date of the application to select the same.” (22 L. D. 493.)

We submit that the decisions of the local office are correct and ought to be sustained, for which action we pray.

E. M. COMYNS,
Attorney for J. W. Thurston.

State of Washington,
County of King,—ss.

Edward M. Comyns, being duly sworn, says that he made service of the foregoing reply brief by mailing a copy thereof by registered mail to Thos. R. Benton, Attorney for the St. Paul, Minneapolis and Manitoba Ry. Co., at his postoffice address at St. Paul, Minn.

EDWARD M. COMYNS.

Subscribed and sworn to before me this 31st day
of Aug., 1910.

J. HENRY SMITH,
Register. [169]

GENERAL LAND OFFICE,
WASHINGTON, D. C.

October 25, 1910.

JOHN W. THURSTON

vs.

ST. PAUL, M. & M. RY. CO.

INVOLVING: E. $\frac{1}{2}$ NW.④ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$,
Sec. 12, T. 39, N., R. 6 E., W. M., Washington.

CALLING FOR AFFIDAVITS.

Register and Receiver,
Seattle, Washington.

Sirs:

April 1, 1910, you were directed to appoint a day
for a hearing in the above-entitled case, under the
instructions from the Department, dated March 19,
1910, wherein you held that,

It would seem from the allegations contained
in the affidavit accompanying the appeal that
the appellant is entitled to a hearing in order
that he may be afforded an opportunity of
proving the allegations made by him; because,
if, as a matter of fact, the land was occupied
by a *qualified settler* at the date of the com-
pany's selection, such land was not subject to
selection (37 L. D. 193, 502 and 576).

You accordingly named May 24, 1910, and notified the parties in interest. The appellant was present with his witnesses and attorney, but the company was in default. You held, from the evidence submitted by Thurston, adverse to the company, and the case is here on appeal from your action.

It is essential that the evidence be clear as to whether the land was occupied by a *qualified settler* May 9, 1902, the date of the company's selection.

Dan O'Donnell, of Lawrence, a witness, testified that, in 1902, he resided at Maple Falls, in charge of a mine that he bought of a squatter, a Mr. Cole, on the land in question, who had a trail in there and started a cabin, that he paid him (\$100) one hundred dollars for location fees; that the cabin was completed about March, 1902; that he posted notices indicating what land was claimed by him, and was occupying the land on May 9, 1902.

The evidence was *ex parte* and there appears in the record of [170] the proceedings no testimony tending to prove his qualifications to make entry of the land. You will, therefore, call upon Thurston to file the affidavit of Mr. O'Donnell, duly corroborated by two witnesses, as to *his* qualifications on May 9, 1902, for consideration with the evidence in the case.

Very respectfully,
S. V. PROUDFIT,
Assistant Commissioner. [171]

UNITED STATES LAND OFFICE.

JOHN W. THURSTON

vs.

ST. PAUL, M. & M. RY. CO.

INVOLVING: E. $\frac{1}{2}$ NW. $\frac{1}{4}$ & NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec.
12, T. 39 N., R. 6 E., W. M., Washington.

AFFIDAVIT REQUIRED BY HON. COMMIS-
SIONER'S LETTER "F," SEATTLE, 01662
OF OCT. 25, 1910.

State of Washington,
County of Whatcom,—ss.

Dan O'Donnell, being first sworn, says that he is the indentical Dan O'Donnell who testified in the above-entitled case at the hearing had before the United States District Land Office at Seattle, Wash., on May 24, 1910. That on May 9, 1902, he was a qualified settler of the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, township 39 N., Range 6 E. That on said date he possessed all the qualification requisite to make entry of said land under the homestead laws.

DAN O'DONNELL.

Subscribed and sworn to before me this 16th day of December, 1910.

[Seal]

W. H. PEMBERTON,
Notary Public in and for the State of Washington,
Residing at Bellingham.

State of Washington,
County of Whatcom,—ss.

Herman Steiner and H. E. Leavitt, being duly sworn say, that they and each of them are well acquainted with Dan O'Donnell who subscribed and swore to the foregoing affidavit and were so acquainted with said Dan O'Donnell on May 9, 1902; that the facts set forth in the foregoing affidavit relative to the qualification of Dan O'Donnell to make entry on the land described are true of their knowledge.

HERMAN STEINER.

H. E. LEAVITT.

Subscribed and sworn to before me this 21st day of December, 1910.

CHARLES W. BEAL,

Notary Public in and for the State of Washington,
Residing at Maple Falls, Wash. [172]

GENERAL LAND OFFICE.

WASHINGTON.

March 9, 1911.

JOHN W. THURSTON

vs.

ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY CO.

INVOLVING: E. $\frac{1}{2}$ NW. $\frac{1}{4}$ & NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec.
12, T. 39 N., R. 6 E., Washington.

DECISION ADVERSE TO COMPANY.

Register and Receiver,
Seattle, Washington.

Sirs:

The land involved herein was selected by said Company, May 9, 1902, per list No. 44, prior to survey, under the provisions of the act of August 5, 1892 (27 Stat. 390). The official plat of survey of the township in which the land lay was filed in the local office on February 6, 1907. Thurston, the same day, filed his homestead application for the same land alleging that he had commenced settlement thereon, December 11, 1906, with improvements of the value of \$650.00, consisting of a dwelling-house, 16X28 feet, containing six rooms, chicken-house, cowshed, one acre cleared and half an acre slashed.

His application was rejected, February 27, 1907, by your office, because of the company's list No. 44, filed May 9, 1902.

Your action was approved by this office, on appeal, July 23, 1909, and, on further appeal, the Department, March 19, 1910, affirmed the decision of this office on the record thus made, but, in the appeal to the Department, Thurston complained that your office had erred in failing to order a hearing, and accompanied his appeal with his affidavit, corroborated by that of two other persons, that the land was first settled upon in the year 1901, by one Alfred Small, who built a cabin thereon and resided there, improving the same and occupying it until

March, 1902, when he transferred his claim to Daniel O'Donnell, who immediately commenced his residence on the land and continued to occupy it until the fall of 1906, when he conveyed [173] all his right to the land, together with the improvements thereon, to Thurston; that during the period of O'Donnell's occupancy of the land, he was qualified to make homestead entry and occupied it with a view to making such entry; that appellant settled on the land in December, 1906, and has lived continuously there ever since; that the improvements thereon, at that time, were worth the sum of \$2,000, and that, at all times up to February 6, 1907, when the plat was filed in the local office, he was ignorant of the fact that the railway company was claiming the land in any way.

Upon this showing, the First Assistant Secretary held that the appellant was entitled to a hearing, in order that he be afforded an opportunity to prove the allegations made by him; because if, as a matter of fact, the land was occupied by a qualified settler at the date of the company's selection, such land was not subject to selection (37 L. D. 193, 502, and 576).

You, by letter "F" of April 1, 1910, were accordingly directed to appoint a day for a hearing, with notice to the parties in interest to appear, with their witnesses, and submit testimony as to the status of the land on May 9, 1902, the date of the company's selection.

You named May 24, 1910, for the hearing before your office, and notified the parties.

On the day appointed, Thurston was present, with his attorney and witnesses, but the company was in default.

Thurston and five witnesses in his behalf, testified, but no witnesses were examined for the company.

You found, from the evidence submitted, that is satisfactorily appeared that, on May 9, 1902, the land in controversy was occupied by a qualified settler, and held that the selection of the same by said company should be canceled and that the homestead application by said Thurston for the same land should be allowed.

The record of the case shows that a copy of your decision of May 24, 1910, adverse to the company, was served by registered mail, on its counsel, Thomas R. Benton, at St. Paul, Minnesota, [174] June 20, 1910, who filed an appeal therefrom July 18, 1910, and a reply brief by the attorney for Thurston was filed, August 31, 1910.

September 1, 1910, you transmitted the record, as made in the case, under the instructions of the Department in its decision dated March 19, 1910.

Your findings of facts as shown by the evidence submitted in connection with the corroborated affidavit of Dan O'Donnell, enclosed with your letter of December 23, 1910, is correct, and no attempt appears to have been made to traverse the same. Your conclusions are in accordance with the law, as enunciated in 37 L. D., 193, 502, and 576.

Your action is, therefore, approved, and the company's list No. 44, as to the tracts involved herein,

is hereby held for cancellation, subject to appeal.

You will so advise Thurston. The Company is notified by this office.

Very respectfully,

S. V. PROUDFIT,

Assistant Commissioner. [175]

DEPARTMENT OF THE INTERIOR.

HOMESTEAD ENTRY.

U. S. LAND OFFICE, Seattle Washington.

See "F" July 25, 1911. Serial No. 01662.

Sup. Application. Receipt No. 335473.

APPLICATION.

I, John W. Thurston (Male), a resident of Maple Falls, Whatcom County, Washington, do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the the SE.¼ SW.¼, Sec. 1, E.½ NW.¼, NE.¼ SW.¼, Section 12, Township 39 N., Range 6 E., Willamette Meridian, containing 160 acres, within the Seattle, Washington land district; and I do solemnly swear that I am not the proprietor of more than 160 acres of land in any State or Territory; that I am a native born citizen of the United States, and am married and over the age of 21 years: that my postoffice address is Maple Falls, Washington; that this application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to the settlement, residence, and culti-

vation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making this entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which I may acquire from the Government of the United States will inure in whole or in part to the benefit of any person except myself. I further swear that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; and that I have not heretofore made any entry under the homestead laws, _____

(Here describe former homestead entry, etc.)

that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined same; that there is not to my knowledge within the limits thereof any vein or lode or quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor

other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any Indian.

JOHN W. THURSTON. [176]

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant has been satisfactorily identified before me by Edward M. Comyns, 323-24 White Building, Seattle, Washington; that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in Seattle, King County, Washington, within the Seattle Washington land district, this 22d day of August, 1911.

JOHN C. DENNY,
Register.

UNITED STATES LAND OFFICE at Seattle,
Wash.

August 22, 1911.

I HEREBY CERTIFY that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under Sec-

tion 2289, Revised Statutes of the United States, that there is no prior valid adverse right to the same, and has this day been allowed.

JOHN C. DENNY,
Register.

This homestead application is made in lieu of like homestead application made February 6, 1907, said original application having been heretofore transmitted with the files in the case of John W. Thurston against St. Paul, Minneapolis & Manitoba Railway Company, Seattle 01662, and not returned to the local land office.

JOHN C. DENNY,
Register. [177]

NOTICE OF INTENTION TO MAKE PROOF.
DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE at Seattle, Wn.

Aug. 10, 1912.

I, John W. Thurston, of Maple Falls, Washington, who, on August 22, 1911, made Homestead Entry, No. 01662, for SE.1/4 SW.1/4, Sec. 1; E.1/2 NW.1/4, NE.1/4 SW.1/4, Section 12, Township 39 N., Range 6 E., Willamette Meridian, hereby give notice of my intention to make Final five year Proof, to establish my claim to the land above described, before Register and Receiver, at Seattle, Washington, on the 28th day of September, 1912, by two of the following witnesses:

| | |
|-----------------|-------------------|
| Roy Fox, | of Glacier, Wash. |
| W. D. Fox, | of Glacier, Wash. |
| Charles Bourne, | of Glacier, Wash. |
| Herman Steiner, | of Glacier, Wash. |

JOHN W. THURSTON.

August 10, 1912.

Notice of the above intention to make proof will be published in the Leader, Maple Falls, Washington, for a period of five consecutive weeks, which I hereby designate as the newspaper published nearest the land above described.

JOHN C. DENNY,
Register. [178]

NOTICE FOR PUBLICATION.

(Register)

DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE at Seattle, Wash.

August 10, 1912.

NOTICE is hereby given that John W. Thurston, of Maple Falls, Washington, who, on August 22, 1911, made Homestead Entry Serial No. 01662, for the

SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, and E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$
SW. $\frac{1}{4}$,

Section 12, Township 39 N., Range 6 E., Willamette Meridian, has filed notice of intention to make five year Proof, to establish claim to the land above described, before the Register and Receiver, U. S. Land Office, at Seattle, Washington, on the 28th day of September, 1912.

Claimant names as witnesses:

Roy Fox, of

W. D. Fox, of

Charles Bourne, of

Herman Steiner, all of Glacier, Washington.

JOHN C. DENNY,
Register.

vs. Albert R. McPhee and Frances McPhee. 191

CERTIFICATE AS TO POSTING OF NOTICE.

September 28, 1912.

I HEREBY CERTIFY that the above notice, or copy thereof, was by me posted in a conspicuous place in my office for a period of more than 30 days, I having first posted said notice on the 10th day of August, 1912. Notice posted continuously from Aug. 10, 1912, to September 28, 1912.

JOHN C. DENNY,

Register. [179]

DEPARTMENT OF THE INTERIOR,

HOMESTEAD ENTRY.

U. S. LAND OFFICE, Seattle, Washington.

Sept. 28, 1912. No. 01662

Receipt No. 940649.

FINAL PROOF.

TESTIMONY OF CLAIMANT.

Question 1. What is your full name, age, and postoffice address?

Answer. John W. Thurston, age 35 years, Maple Falls, Wash.

Question 2. Are you a native-born citizen of the United States, and if so, in what State or Territory were you born? (If foreign born, or if native-born and later naturalized in a foreign country, see Note 1.)

Answer. I am and was born in California.

Question 3. Are you the same person who made Homestead Entry No. 01662, at the Seattle, Washington, Land Office on the 22d day of August, 1911, for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and

NE.1/4 SW.1/4, Section 12, Township 39 N., Range E., Willamette Meridian?

Answer. I am.

Question 4. Are you married or single?

Answer. Married.

Question 5. If married, of whom does your family consist?

Answer. Wife and four children.

Question 6. If a married woman, state whether your husband now has an unperfected homestead entry, and during what time he has resided on this land with you. Also state his citizenship qualifications. (See Note 1 at bottom of third page.)

Answer.

Question 7. When did you first establish actual residence upon this land?

Answer. In February, 1907.

Question 8. When was your house built on this land? .

Answer. In December, 1906, began to build and finished house in February, 1907.

Question 9. Have either you or your family ever been absent from the homestead since establishing residence?

Answer. No.

Question 10. If there has been such absence, give the dates covered by each absence; and as to each absence state whether you, your family, or both, were thus absent and the reason for each such absence.

Answer. No absences. During 1908 my wife

and I were away for three weeks, but my children remained on the homestead. [180]

Question 11. Describe the land embraced in above entry by legal subdivisions, showing fully the character of same, and kind and amount of timber, if any.

Answer:

| | | Acres. | | Acres | |
|--------------|-----------------|-------------|--|-----------|------------|
| Subdivision. | | Cultivable. | | timbered. | Ft. timber |
| SE.1/4 | SW.1/4, Sec. 1 | 40 | | 2d growth | |
| NE.1/4 | NW.1/4, Sec. 12 | 40 | | 40 | 1 million |
| SE.1/4 | NW.1/4, Sec. 12 | 40 | | 40 | 1 million |
| NE.1/4 | SW.1/4, Sec. 12 | 40 | | 40 | 1 million |

Question 12. State by subdivisions the number of acres cultivated, kind of crop planted, and amount harvested, each year. How many acres of the claim are now cleared or broken and under cultivation? If used for grazing only, state number and kind of stock grazed each year, and by whom owned.

Answer. In 1907 cleared one acre and planted same. County road took three-fourths of an
 19 acre of my clearing, but I now have one acre
 19 free of stump and under cultivation and three
 19 other acres slashed—one and one-half acres of
 19 which is ready for cultivation. Crops have
 19 averaged an acre each year. Have raised stuff
 19 for family use. There is no market. Have
 19 raised vegetables, hay and small fruit. Have
 19 planted \$35 for fruit trees, but have only two
 19 living. I have a team of horses and chickens
 and ducks, etc.

Question 13. Describe fully and in detail the amount and kind of improvements on each subdivision. State total value of improvements on the claim.

Answer. Subdivision. SE.1/4 SW.1/4, Sec. 1.

Character of Improvements.

My house has 9 rooms with hot and cold water piped through house. House is papered inside and painted outside. House is 1 1/2 stories. Barn 28x30. Cellar that costs about \$100. Three chicken houses. 300 feet of chicken-yard fence of wire. Water is piped 500 feet from creek. Water is piped to the barn. Have about \$500 worth of road work. All of my improvements including clearing worth about \$3,000.

Question 14. Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Answer. No and not used for trade or business.

Question 15. Are there any indications of coal, salines, or minerals of any kind on the land? If so describe what they are.

Answer. No.

Question. Have you ever made any other homestead entry? If so, describe the same.

Answer. No.

Question 16. Have you sold, conveyed, or agreed to sell or convey any portion of the land? If so, to whom and for what purpose?

Answer. I have not.

Question 17. Have you optioned, mortgaged, or agreed to option or mortgage, or convey this land, or any part thereof? If so, when, to whom, and for what purpose and in what amount? [181]

Answer. No.

Question 18. Have you any personal property of any kind elsewhere than on this claim? If so, describe the same, and state where the same is kept.

Answer. No.

~~Question 19.~~

Question 20. Have you, since August 30, 1890, made any entry or filing (not mineral) other than homestead? If so, describe the same by legal subdivisions, or by number, kind of entry, and office where made.

Answer. None made.

JOHN W. THURSTON.

I HEREBY CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition was read to or by deponent in my presence before deponent affixed signature thereto; that deponent has been satisfactorily identified before me by E. M. Comyns, Seattle, Wash.; that I verily believe deponent to be the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me at my office in Seattle, King County, Washington, within the Seattle, Washington, land district, this 28th day of September, 1912.

JOHN C. DENNY,
Register. [182]

FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANTS.

I, John W. Thurston, having made a Homestead entry of the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Township 39 N., Range 6 E., Willamette Meridian, subject to entry at Seattle, Washington, under section No. 2289, of the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of section No. 2291 of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am a native-born citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon said land since the February, 1907, to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes, but that I am the sole *bona fide* owner as an actual settler; that I will bear true allegiance to the Government of the United States; and, further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

JOHN W. THURSTON.

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that I verily believe affiant to be a credible person and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before

me, at my office, in Seattle, King County, Washington, this 28th day of September, 1912.

JOHN C. DENNY,
Register. [183]

DEPARTMENT OF THE INTERIOR.
HOMESTEAD ENTRY.

U. S. LAND OFFICE, Seattle, Washington,
Sept. 28, 1912. No. 01662.

FINAL PROOF.

TESTIMONY OF WITNESS.

Question 1. What is your full name, age, and postoffice address?

Answer. Roy Fox; age, 36 years; Glacier, Wash.

~~Question 2.~~

Answer.

Question 3. How long have you known the claimant in this case and the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, Township 39 N., Range 6 East, Willamette Meridian, the land embraced in Homestead Entry, No. 01662, made at the Seattle, Washington, Land Office?

Answer. Land and claimant 7 years.

Question 4. Is entryman married?

Answer. Married.

Question 5. Is said tract within the limits of an incorporated town, or used in any way for trade or business?

Answer. No and not used for trade or business.

Question 6. When did entryman settle upon the homestead?

Answer. December, 1906.

Question. 7. At what date did entryman establish actual residence thereon.

Answer. In February, 1907.

Question 8. Have entryman and family resided continuously on the homestead since thus establishing residence thereon?

Answer. Yes.

Question 9. Have entryman and family ever been absent from the homestead since thus establishing residence thereon?

Answer. No absences.

Question 10. If there have been any such absences, give the dates covered by such absences, stating who was absent and for what reason.

Answer. No absences. Claimant and family were away once two or three weeks, but children remained on the land at that time. [184]

Question 11. Describe the land embraced in above entry by legal subdivisions, showing fully the character of same, and kind and amount of timber, if any.

Answer. Subdivision.

Cannot subdivide the land and give the data, but think there are 3 or 4 million feet of timber on the land. About two-thirds or one-half could be cultivated and balance would be good pasture land.

Question 12. State by subdivisions the number of acres cultivated and kind of crop planted, and amount harvested each year. How many acres of the claim are now cleared or broken and under cultivation? If used for grazing only, state num-

ber and kind of stock grazing each year and by whom owned.

Answer. In 1907 he had a garden. Each year since that time he has had a crop. About an acre is under cultivation. Cultivation has been about an acre each year. Besides the cultivated land now under cultivation, the county road took about three-quarters of an acre of the land. I think he has three or four acres of land slashed and partly cleared besides the cultivated land. He has raised vegetables of all kinds and berries. Also he has seeded some of the burned over land. He has raised stuff for his own use. He has a team of horses and chickens and ducks.

Question 13. Describe fully and in detail the amount and kind of improvements on each subdivision. State total value of improvements on the claim.

Answer.

Submission

Charter of Improvements.

SE.1/4 SW.1/4, Sec. 1.

7-room. house not including pantry and bathroom. He has a good barn. Chicken-house. Root cellar. Road work. Water is piped from creek into his house and to barn. Value of improvements including clearing, \$2,500.

Question 14. Are there any indications of coal, salines, or minerals of any kind on the land? If so, describe what they are.

Answer. No.

Question 15. Have you any knowledge or information that claimant has sold or contracted to sell, optioned, mortgaged, or agreed to option or mortgage this land? If so, give full details as to whom, for what purpose and in what amount.

Answer. I have not. [185]

Question 16. Have you personal knowledge, from your own observation, that claimant and his family (if any) actually resided upon and cultivated this land each year in accordance with your above testimony.

Answer. I have.

Question 17. How many times each year have you seen this land, and the claimant and his family residing thereon; and what other personal knowledge have you upon which your answers are based?

Answer. On the average three times a week for the past five or six years.

Question 18. Are you interested in this claim, or related to the claimant? If so, how?

Answer. Not interested. Not related.

ROY FOX.

I HEREBY CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition was read to or by deponent in my presence before deponent affixed signature thereto; that deponent has been satisfactorily identified before me by John W. Thurston, Maple Falls, Wash.; that I verily believe deponent to be the identical person hereinbefore described and that said deposition was duly subscribed and sworn to before me at my office

vs. Albert R. McPhee and Frances McPhee. 201
in Seattle, King County, Wash., with the ~~land dis-~~
~~trict~~ Seattle, Washington, land district, this 28th
day of September, 1912.

JOHN C. DENNY
Register. [186]

DEPARTMENT OF THE INTERIOR.
HOMESTEAD ENTRY.

U. S. LAND OFFICE, Seattle, Wash.
Sept. 28, 1912. No. 01662.

FINAL PROOF.

TESTIMONY OF WITNESS.

Question 1. What is your full name, age and
postoffice address?

Answer. Charles Bourne; age, 43 years; Gla-
cier, Wash.

Question 2.

Answer.

Question 3. How long have you known the
claimant in this case and the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1,
E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, Town-
ship 39, N. Range 6 E., Willamette Meridian, the
land embraced in Homestead Entry, No. 01662,
made at the Seattle, Wash., Land Office?

Answer. Land and claimant 7 years.

Question 4. Is entryman married?

Answer. Married.

Question 5. Is said tract within the limits of an
incorporated town, or used in any way for trade
or business?

Answer. No and not used for trade or business.

Question 6. When did entryman settle upon
the homestead?

Answer. Six years ago.

Question 7. At what date did entryman establish actual residence thereon?

Answer. In February, 1907.

Question 8. Have entryman and family resided continuously on the homestead since thus establishing residence thereon?

Answer. Yes, sir.

Question 9. Have entryman and family ever been absent from the homestead since thus establishing residence thereon?

Answers. No absences.

Question 10. If there have been any absences, give the dates covered by such absences, stating who was absent and for what reason.

Answer. None. [187]

Question 11. Describe the land embraced in above entry by legal subdivisions, showing fully the character of same, and kind and amount of timber, if any.

Answer.

| Subdivision | Acres | Acres | Feet |
|--|------------|----------|--------|
| | Cultivable | Timbered | Timber |
| On the SE. $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. | | | |
| 1, there is no timber. | | | |
| Other three forties have 1 million feet on each forty, or 3 million feet altogether. Including pasture, all of the land could be cultivated. | | | |

Question 12. State by subdivision the number of acres cultivated and kind of crop planted, and amount harvested each year. How many acres of the claim are now cleared, or broken, and under cultivation? If used for grazing only, state number and kind of stock grazer each year and by whom owned.

Answer. I am sure that he has had crops for past five years. He has the stumps out of an acre.
19 The county road took up quite a lot of his clearing. He has raised vegetables and berries
19 for his family's use. He has ten or fifteen acres of burned over land seeded down to
19 pasture. He has planted fruit trees, but there are only two living. His crops have averaged
19 an acre each year.
19

Question 13. Describe fully and in detail the amount and kind of improvements on each subdivision. State total value of improvements on the claim.

Answer.

| Subdivision | Character of improvements |
|---|---|
| On the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1. | Nine room house, including pantry and bathroom. House is papered inside and painted outside. House has water piped into it from creek. Barn 28x30. Chicken-houses. Root house. Quite a lot of road work, all worth about \$2,500. |

Question 14. Are there any indications of coal, salines, or minerals of any kind on the land? If so, describe what they are.

Answer. No.

Question 15. Have you any knowledge or information that claimant has sold or contracted to sell, optioned, mortgaged, or agreed to option or mortgage this land? If so, give full details as to whom, for what purpose and in what amount.

Answer. I have not. [188]

Question 16. Have you personal knowledge, from your own observation that claimant and his family (if any) actually resided upon and cultivated this land each year in accordance with above testimony?

Answer. I have.

Question 17. How many times each year have you seen this land, and the claimant and his family residing thereon; and what other personal knowledge have you upon which your answers are based?

Answer. I live on the adjoining land and have lived there three years. Also lived near his land before that time. Have seen him or family on the land nearly every week.

Question 18. Are you interested in this claim, or related to the claimant? If so, how?

Answer. Not interested. Not related.

CHARLES BOURNE.

I HEREBY CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition

was read to or by deponent in my presence before deponent affixed signature thereto; that deponent has been satisfactorily identified before me by John W. Thurston, Maple Falls, Wash.; that I verily believe deponent to be the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me at my office in Seattle within the Seattle, Wash., land district, this 28th day of September, 1912.

JOHN C. DENNY,

Register. [189]

GENERAL LAND OFFICE,
WASHINGTON.

January 10, 1913.

NOTICE—ACT JUNE 22, 1910 (36 STAT. 583).

FINAL CERTIFICATE AUTHORIZED
UPON CONDITION.

Register and Receiver,
Seattle, Washington.

Sirs:

On August 22, 1911, John W. Thurston, of Maple Falls, Washington, made homestead entry No. 01662, at your office, for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, T. 39 N., R. 6 E., W. M. Final proof was submitted in support thereof September 28, 1912, and action thereon was deferred because of a protest by the chief of field division. Plat of survey was filed in your office February 6, 1907.

Claimant, in his final proof, alleges settlement on the land in February, 1907. His application was

presented on February 6, 1907, but owing to a contest with the St. Paul, M. & M. Railway Company, his application was not allowed until the above date.

This land was withdrawn July 26, 1906, under the Coal Land Laws; later included in Coal Land Withdrawal by Executive Order of July 7, 1910. No other withdrawals appear of record.

On August 10, 1912, claimant filed his selection to receive patent exclusive of the coal deposits, under the act of March 3, 1909 (36 Stat. 844). This selection will be considered hereafter.

Under date of October 26, 1912, a special agent of this office submitted a report on this land, wherein he states that he found the entryman living on the tract of land with his family, and learned from the neighbors that he had resided thereon continuously for nearly six years. The improvements consist of a frame house of 7 rooms, with bath and pantry, two porches, well built and complete, value \$1400; root house, frame barn, gravity water system for the house and barn, 3 acres fenced and partly cleared, one acre in cultivation, and another acre which had been cleared had been taken for a railroad and wagon road. The value of the improvements is about \$2400. Claimant keeps a team of work horses; also a cow, pigs, chickens and geese. The agent further reports that Mr. Thurston has cut from 250 to 350 thousand feet [190] of fir timber from the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 1, the same being valued at \$1.00 per thousand. This area has since been burned over and sowed to grass, but there

is very little pasture on it at present. Claimant has also cut and sold 675 cords of cedar wood from the land in Section 12. He states that he is clearing this area and preparing the same for cultivation. The agent reports that this land is good soil and better than the average.

No timber trespass case against the claimant is of record in this office.

In view of the fact that the date of claimant's alleged settlement was in December, 1906, and as the land had previously been withdrawn because of its coal character in July of the same year, it would appear that the claimant is not entitled to an election under the Act of March 3, 1909, above, but the same must be adjudicated under Sec. 1 of the act of June 22, 1910 (36 Stat. 383). Under circular of September 9, 1910, containing the instructions relative to the above act, it is provided for in Par. 3 that those who have initiated non-mineral entries, selection or locations prior to the passage of this act, on lands withdrawn or classified as coal, may perfect the same under the provision of the law under which said entries are made, but shall receive a limited patent provided for in the act, unless the lands are restored to entry under the general land laws prior to final action, or unless within thirty days from receipt of notice in cases where final proof has been made, or prior to final proof where such proof has not been submitted, they submitted evidence, or preferably the sworn statement of experts or practical miners, that the land is, in fact, non-coal in character, together with an application for classification.

You will, therefore, inform the entryman that he is hereby allowed thirty days in which to make an application for classification of the land, as above stated, and that if he fails to file said application, or appeal within this time, the final certificate will be issued containing the coal reservation, in accordance with the act of June 22, 1910. [191]

The agent's report has been carefully considered, and the case is clearlisted and closed as to the field division. Proof has been examined and found to be regular and satisfactory, and if there is no further protest or conflict of record, you are directed to issue the final certificate containing the above coal reservation, in the event that claimant in the time allowed him fails to file an application for classification.

Respectfully,

Commissioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. January 6, 1920. F. M. Harshberger, Clerk. [192]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
and BELLINGHAM BAY IMPROVE-
MENT COMPANY, Corporations,
Defendants.

**Separate Motion of Great Northern Railway
Company.**

Comes now the defendant Great Northern Rail-
way Company and separately moves the Court as
follows:

I.

That the Court dismiss the above-entitled cause
as to this defendant upon the ground that the
amended bill of complaint (being the last amended
complaint and the one served December 9, 1920)
fails to state facts sufficient to constitute a valid
cause of action in equity.

THOMAS BALMER,
Solicitor for Defendant Great Northern Railway
Company. Postoffice Address: King Street
Passenger Station, Seattle, Washington.

We hereby acknowledge service of the foregoing

motion and receipt of a true copy thereof, this 24th day of December, 1920.

S. M. BRUCE.

By D. W. FEATHERKILE,
Attorney for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. December 28th, 1920. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [193]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
and BELLINGHAM BAY IMPROVE-
MENT COMPANY, Corporations,
Defendants.

**Separate Motion of Bellingham Bay Improvement
Company.**

Comes now the defendant Bellingham Bay Improvement Company and separately moves the Court as follows:

I.

That the Court dismiss the above-entitled cause as to this defendant upon the ground that the amended bill of complaint (being the last amended

complaint and the one served December 9, 1920) fails to state facts sufficient to constitute a valid cause of action in equity.

CLINTON W. HOWARD,

Solicitor for Defendant Bellingham Bay Improvement Company. Postoffice Address: 206 First National Bank Building, Bellingham, Washington.

Service accepted. December 24, 1920.

S. M. BRUCE.

By D. W. FEATHERKILE,

For Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. December 28, 1920. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [194]

In the United States District Court for the Western District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corporation,
Defendants.

Decision.

Filed July 19, 1921.

S. M. BRUCE, Attorney for Plaintiffs.

CLINTON W. HOWARD, Solicitor for Bel. Bay
Imp. Co.

THOMAS BALMER, Solicitor for Gt. Northern
Ry. Co.

NETERER, District Judge.

Plaintiffs seek to establish title to the west half of the NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Section 12, Township 39 North, Range 6 East, and to have the defendants, in whom the said title rests by virtue of patent issued on the 24th day of July, 1919, declared as trustees for the plaintiff. Plaintiff in substance alleges that in 1901 one C. C. Cole qualified to enter public lands, settled upon and claimed said land with the intention of acquiring a homestead. Said lands at the said time were unsurveyed. Cole erected a home and opened roads, and in the month of October, 1891, sold his improvements and right of occupancy to Daniel O'Donnell, qualified to make a homestead entry upon public lands; that O'Donnell went into the possession of said land with the intention of acquiring title, establish his residence, "built houses and sheds, fenced and cleared ground and posted notices showing the particular lands claimed by him," and continued to reside on said land until 1906, when for a valuable consideration he sold and conveyed his possessory right to one Thurston, qualified to enter public lands, who

entered upon the land for the purpose of acquiring homestead and continued in possession until November, 1906, when for value he sold his improvements and possessory rights to the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, to Peter Beebe, who was qualified to enter public lands with the intention of acquiring title under the homestead laws; that in September, 1909, for a valuable consideration, Beebe sold and conveyed his possessory rights and improvements [195] to the plaintiffs, who entered into the possession of said lands for the purposes and intention of acquiring title thereto under the homestead laws, plaintiff being qualified to enter lands under the public land laws; that on the 19th day of May, 1902, while O'Donnell was actually residing upon the said land with the intention as stated, the land being unsurveyed, the defendants filed in the office of United States Land Office at Seattle, List No. 44, selecting said lands among others as lieu selection under the Act of Congress, approved August 5, 1892; that on February 6, 1907, the survey for said land was filed, and on the 23d of said month defendants described said lands conformable to such survey, which conformed to the lands claimed by the plaintiff by reason of the possessory rights and improvements made thereon, and notices posted; that the defendants knew of the rights and claims of the plaintiffs and his grantors, and that said lands were settled upon, and that homestead rights had been initiated and actively asserted; that on September 27, 1909, plaintiff made application to file his homestead entry on and for said land; tendered the money to the proper officers,

which application was rejected because in conflict with lieu Selection List No. 44. From said decision plaintiffs appealed to the Commissioner of the General Land Office, and thereafter to the Secretary of the Interior, and that the proofs presented establish the right of the plaintiff to said land; that the filing of List No. 44 was a fraud upon the plaintiffs' grantors, making defendants trustees for the plaintiffs in obtaining the patent by misleading the officers of the Land Department; that the Land Department committed error of law in denying to the plaintiffs such land and awarding same to defendants. Many other allegations appear in the bill of complaint, but this is all that is material. The defendants move to dismiss. From the exhibits and proceedings in the Land Department the proofs entered are set forth in the complaint, it appears that on September 27, 1909, plaintiff, McPhee, tendered his homestead application for [196] for the lands herein described, which was rejected December 8, 1910, and November 18, 1914, for conflict with selection List No. 44, filed May 19, 1902, by the St. Paul, Minneapolis & Manitoba Railway Co. under the list filed May 19, 1902, under the Act of August 5, 1892, 27 Stat. 390, and plat of survey was filed in the local office February 6, 1907. On February 23, 1907, the Railway Co. described the same lands as conforming to the survey. On April 8, 1916, plaintiff filed a petition for the exercise by department of supervisory authority in the matter of his application, which was decided April 18, 1916, against

the plaintiff. In the decision the Assistant Secretary says:

“The affidavit of McPhee alleges that the land applied for by him was, in 1901, embraced in the settlement of one Al. Small, who sold whatever rights he might have to Dan O'Donnell; that O'Donnell went into actual occupation of the land and was a settler thereon at the time of the filing of railway company's list. O'Donnell later sold his improvements to John W. Thurston, it being further alleged that O'Donnell's house or cabin was situated upon the SW. $\frac{1}{4}$ N. $\frac{1}{4}$, Sec. 12, as to which McPhee is corroborated by one Benson. The affidavit of Peter Beebe states that beginning in August, 1906, he claimed a settlement right upon the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 1, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 12. In November, 1906, however, in consideration of \$50.00 paid to him by Thurston he changed his claim to the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, which included the tract upon which O'Donnell's cabin was located. No affidavit by O'Donnell has been filed by McPhee.

“The records of the department disclose that upon February 6, 1907, John W. Thurston made homestead application * * * for the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ SW. Sec. 12, which was rejected because of conflict with the railway company's selection as to all tracts except the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1. By departmental decision of March 19, 1910, a hear-

ing was ordered to determine the rights between Thurston and the railway company. At this hearing Small testified that in 1901 he was employed to construct a cabin upon the land by C. C. Cole. Cole sold the cabin before its completion to Dan O'Donnell, who finished it and established residence therein prior to May 9, 1902. O'Donnell also posted a notice of his settlement, but the exact description of the land claimed by him does not appear. O'Donnell testified to his settlement upon the land claimed by Thurston and that he sold whatever rights he had to Thurston in the fall of 1906. Thurston testified that his purchase from O'Donnell was upon October 22, 1906, and that he himself established residence in December, 1906. Thurston stated in his testimony: Q. 'Now, when did you take up your residence on the land?' A. 'That same fall; being a quarter of a mile back from [197] there I drops one forty and takes another forty, and I takes my improvements and puts them down on another forty. I didn't want to move my children and family up in the cabin, so I put up a cabin there.'

"This may, perhaps, refer to the transaction alleged in Beebe's affidavit. As the result of the hearing, Thurston's application was allowed August 23, 1911. He made final proof September 28, 1912, final certificate issuing January 24, 1913, and patent April 29, 1913.

"February 6, 1907, Peter Beebe filed homestead application for the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1,

W. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, which was rejected by the Register and Receiver as to the lands in Sec. 12 for conflict with the railway selection. Upon appeal their action was affirmed by the Commissioner in a decision dated July 28, 1909, notice of which was served upon Beebe's attorney September 21, 1909. September 23, 1909, Beebe executed a relinquishment of the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, to the United States, stating therein that he has transferred 'my right and good will to E. R. McPhee.' The relinquishment which had been purchased by McPhee for the sum of \$50.00 was filed September 27, 1909, concurrently with his homestead application. Beebe's application was allowed as to the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 1, August 21, 1909 * * * upon which patent was issued April 23, 1915.

"From the above facts it is apparent that McPhee's claim is based upon the proposition that the land applied for by him was excepted from the railway selection by virtue of O'Donnell's settlement. McPhee failed to show any privity with O'Donnell, or exactly what land O'Donnell claimed under his settlement. Further, the settlement of O'Donnell is the same as that asserted by Thurston as transferee from O'Dibbekk, Thurston's application was allowed on the basis of O'Donnell's settlement right. The petition, however, asserts that if the showing made in the affidavits submitted by McPhee is correct, the action of the Department in al-

lowing Thurston's application was erroneous and that a suit to set aside the patent issued to Thurston might be instituted. Thurston's final proof, which was substantiated by a filed investigation, disclosed that he established residence in December, 1906, lived continuously upon the land with his family, cultivated about one acre and has a house, barn and other improvements valued at \$3,000.00.

"O'Donnell's settlement claim in any event could not exceed 160 acres. O'Donnell was not in privity with McPhee but was with Thurston. The particular 160 acres claimed by O'Donnell was asserted by Thurston to be the same tract applied for by him and was so determined by the Department without objection from McPhee. *McPhee purchased Beebe's relinquishment after Beebe's application had been rejected*, and failed to file any protest against the allowance of Thurston's entry." (Italics mine.)

The facts as found by the Assistant Commissioner are supported by the testimony in the record. The legal conclusion [198] of the Commissioner as to the fact of residence, and the boundaries of the O'Donnell claim so far as settlement and residence is concerned is erroneous. The cabin was built by Cole and O'Donnell, occupied by O'Donnell, and was upon the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Section 12, at the time the script was filed; that O'Donnell conveyed his right to his claim, including the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ to Thurston, and that Thurs-

ton conveyed his right to the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ to Beebe, is undisputed. The fact that each filed upon their claims in harmony with this division is conclusive, and Thurston testifies that "being a quarter of a mile back from there I drops one forty and takes another forty." The forty that he dropped was the forty that Beebe obtained on which was the cabin. And the forty Thurston took was the forty he got from Beebe. The intent of the occupant O'Donnell in the absence of proof to the contrary is conclusive that it was to enter the land that he occupied, and as the qualifications of Dan O'Donnell as a settler upon public land is absent from the formal application, the department having jurisdiction, opportunity should have been given to supply the qualification as was done in the Thurston case, decision October 25, 1910, in which it is said: " * * * there appears in the record of the proceedings no testimony tending to prove O'Donnell's qualifications to make entry of the land. You will therefore call upon Thurston to file the affidavit of Mr. O'Donnell, duly corroborated by two witnesses as to his qualifications on May 9, 1902, for consideration with the evidence in the case." This proof in this case was filed by McPhee with his petition. By this privity between O'Donnell and McPhee is established, provided the decision of the Commissioner of July 28, 1909, upon appeal rejecting the application of Peter Beebe for homestead entry upon the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Section 12 does not intervene. The right of Beebe to the cabin and improvements could be transferred to McPhee not-

withstanding the rejection of his application. There is no proof in the record other than the departmental decision as to the Beebe rejection, but I think the department has a right to [199] judicially known the condition and status of its own records, especially in view of the relation of Beebe, Thurston and McPhee to this record.

By Departmental Decision. Frank et al. vs. Northern Pac. Ry. Co., 37 Land Dec., page 193, and 502 on review, it is held that public land may not be selected under the Act of August 5, 1892, when embraced within a *bona fide* settlement claim. The Supreme Court in St. Paul, M. & M. Ry. Co. vs. Donahue, 210 U. S. 21, held in effect that the right under the Act of August 5, 1892, to select indemnity lands to which no adverse rights or claim had attached or been initiated, does not include land which had been entered in good faith by a homesteader at the time of the supplemental selection, and on a relinquishment being properly filed by the homesteader, the land becomes open for settlement, and the railway under the act is not entitled to the land under a selection filed prior to such relinquishment. There is no question from the record in this case that O'Donnell was a qualified entryman in 1902, and that he had settled upon the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12 with the intention of making a homestead entry; that he transferred this right to Thurston, which included adjoining lands; that Thurston conveyed his right to this forty acres to Beebe, and that at the time the scrip was filed a *bona fide* settlement was initiated. This, however, Beebe failed to estab-

lish. As a matter of law at the time of filing the scrip the Railway Co. had no right by reason of its selection to this land. Did the adjustment of the survey Feb. 23, 1907, validate the railway selection, when Beebe's relinquishment was filed or when his right was adjudicated against him, or was the land open for settlement, and did the settlement and application to enter on the part of McPhee, initiate a right to the land which should upon the record have been allowed by the Land Department?

Upon this issue the parties may present a further brief.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 21, 1921. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [200]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corpora-
tion,

Defendants.

Decision.

Filed Nov. 9, 1921.

S. M. BRUCE, Attorney for Plaintiffs.

THOMAS BALMER, Solicitor for Gt. Northern
Ry. Co.

CLINTON W. HOWARD, Solicitor for Bel. Bay
Imp. Co.

NETERER, District Judge.—Upon consideration of the supplemental briefs the conclusion must follow that upon the settlement by O'Donnell in 1902 a claim was initiated and attached which reserved the land in issue from operation of lieu selection. Buick vs. Sherman, 93 U. S. 209; Kansas Pac. Ry. Co. vs. Dunmeyer, 113 U. S. 620; Hastings & P. R. Co. vs. Whitney, 132 U. S. 357; Holton vs. P. M. & M. Co., 17 L. D. 537; and the continuity of interest in the improvements, and settlement upon the land from O'Donnell to McPhee being established, McPhee by his complaint shows a right to the land. N. P. Ry. Co. vs. Trodick, 221 U. S. 508; Osborne vs. Froyesth, 216 U. S. 571; Svor vs. Morris, 227 U. S. 524. The adjustment of the survey did not validate the selection as the land was not open for selection. Kas. P. Ry. Co. vs. Dunmeyer, *supra*. The rejection of Beebe's application is not *res adjudicata* as to the United States. The land being open to entry, McPhee being competent was qualified to assert any right which might be claimed by the United States. [201]

The *mala fides* charged in argument with relation to transfer from Thurston to Beebe, tainting the transaction with fraud, destroying transferable interest, is not established. The intent is clearly established that the purpose was not to procure land for another, but rather to procure the particular land for themselves, and an exchange of improvements and right of occupancy to the particular subdivisions shown is not conduct denounced, as contrary to public policy. *Bailey vs. Sanders*, 228 U. S. 603, and other cases cited are predicated upon a different state of facts, and where the person occupied a wholly different relation than McPhee. The demurrer is overruled.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. November 10, 1921. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [202]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 13—E.

ALBERT R. McPHEE et ux.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corpora-
tion,

Defendants.

Order Overruling Motion to Dismiss.

This cause having been submitted to the Court upon the separate motions of the defendants to dismiss the complaint, and arguments having been heard and briefs submitted, and the Court having heretofore considered the same and filed its written opinion in this cause, it is now by the Court ORDERED, that the said motions to dismiss be, and each of the same are, hereby overruled; to which ruling defendants separately and severally except, which exceptions are allowed.

Defendants are allowed twenty-five (25) days from the filing of this order in which to further plead.

JEREMIAH NETERER,

Judge.

O. K. as to form.

C. W. HOWARD,

For Bellingham Bay Improvement Company.

THOMAS BALMER,

For Great Northern Railway Company.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. December 19, 1921. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [203]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 13—B.

ALBERT R. MCPHEE,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corpora-
tion,

Defendants.

Answer and Cross-complaint.

The defendants, Great Northern Railway Company and Bellingham Bay Improvement Company, answer the second amended complaint as follows:

I.

They admit that they respectively are corporations doing business in Whatcom County, Wash-

ington. They deny any knowledge or information sufficient to form a belief as to the alleged marital relation of the plaintiffs, and deny each and every other allegation, matter and thing set forth in paragraph I.

II.

They deny paragraph 2, and each and every allegation, matter and thing therein contained.

III.

They admit that in the year 1901 the West half of the Northwest quarter (W. $\frac{1}{2}$ NW. $\frac{1}{4}$) and the Northwest quarter of the Southwest quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$) of Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) East, W. M., Whatcom County, Washington, were unsurveyed public lands of the United States, and they deny each and every other allegation, matter and thing contained in paragraph 3. [204]

IV.

They admit that on May 19th, 1902, the St. Paul, Minneapolis & Manitoba Railway Company filed in the United States Land Office at Seattle, Washington, its selection list No. 44, describing, among other lands, a tract of land to be described when surveyed as the West half of the Northwest quarter (W. $\frac{1}{2}$ NW. $\frac{1}{4}$) and the Northwest quarter of the Southwest quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$), Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M.; admit that said selection list was filed and said land selected and claimed under an act of Congress approved August 5th, 1892 (27 Stat. 390), entitled "An Act for the relief

of settlers on certain lands in the States of North Dakota and South Dakota"; admit that in said selection list said St. Paul, Minneapolis and Manitoba Railway Company represented that said lands were vacant and unappropriated, and were not interdicted mineral nor reserved lands, and were of the character contemplated by said act of August 5th, 1892; deny that they have any knowledge or information sufficient to form a belief as to whether or not said statements were believed by the officers of the Land Department who received said list for filing, and deny each and every other allegation, matter and thing contained in paragraph 4 and not herein specifically admitted.

V.

Answering paragraph 5 defendants admit that a plat of the survey of the township containing said lands was filed in the local land office at Seattle, Washington, on February 6th, 1907, and that on February 23d, 1907, the said St. Paul, Minneapolis and Manitoba Railway Company filed a supplemental selection list, redescribing said lands conformably to the official survey, and deny each and every other allegation, matter and thing contained in paragraph 5. [205]

VI.

Defendants admit that said St. Paul, Minneapolis & Manitoba Railway Company represented to the United States Land Department and the officers thereof in said supplemental selection list that said lands were vacant and unappropriated, and were not interdicted mineral nor reserved lands, and were

of the character contemplated by said act of August 5th, 1892; deny that they have any knowledge or information sufficient to form a belief as to whether or not the officers of the Land Department believed or acted upon said representations, and deny each and every allegation, matter and thing contained in paragraph 6, and not herein specifically admitted.

VII.

Answering paragraph 7 defendants admit that on or about September 27th, 1909, the plaintiff, Albert R. McPhee, made application to enter said lands as a homestead, and that thereafter proceedings were had upon said application in the Land Department of the United States, as shown in Exhibit "A" attached to said second amended complaint. Defendants deny each and every other allegation, matter and thing contained in paragraph 7.

VIII.

Answering paragraph 8 defendants admit that affidavits were submitted to the Land Department and proceedings had in the Land Department, as shown by Exhibit "A" attached to the second amended complaint, and deny each and every other allegation, matter and thing contained in said paragraph.

IX.

Answering paragraph 9 defendants admit that on or about February 6th, 1907, John W. Thurston made application to enter the Southeast quarter of the Southwest quarter (SE. $\frac{1}{4}$ SW. $\frac{1}{4}$), Section [206] One (1), the East half of the Northwest

quarter (E. $\frac{1}{2}$ NW. $\frac{1}{4}$) and the Northeast quarter of the Southwest quarter (NE. $\frac{1}{4}$ SW. $\frac{1}{4}$), Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., as a homestead, and that proceedings were had upon his application in the United States Land Department, as shown by Exhibit "B" attached to the second amended complaint. Defendants further admit that said land described in this paragraph was patented by the United States to the said John W. Thurston. Defendants deny each and every other allegation, matter and thing contained in paragraph 9, except as herein specifically admitted.

X.

Defendants deny each and every allegation, matter and thing contained in paragraph 10.

XI.

Defendants deny each and every allegation, matter and thing contained in paragraph 11.

XII.

Defendants deny each and every allegation, matter and thing contained in paragraph 12.

XIII.

Defendants deny each and every allegation, matter and thing contained in paragraph 13.

XIV.

Answering paragraph 14 defendants admit that on or about the 24th day of July, 1919, the United States of America issued to the defendant Great Northern Railway Company, as successor in interest of the St. Paul, Minneapolis & Manitoba Railway Company, a patent of said West half of the North-

west quarter (W. $\frac{1}{2}$ NW. $\frac{1}{4}$) and Northwest quarter of the Southwest quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$), [207] Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., and that thereafter said Great Northern Railway Company conveyed to the Bellingham Bay Improvement Company said Northwest quarter of the Southwest quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$) of said Section Twelve (12); admit that under and by virtue of said patent and deed the defendants assert title in fee and the right of possession of the parcels of land respectively owned by them. Defendants deny each and every other allegation, matter and thing contained in paragraph 14.

XV.

Answering paragraph 15 defendants admit that there is valuable timber upon said land, and that defendants assert the right to cut and remove the same at their will. They deny each and every other allegation, matter and thing contained in said paragraph.

For their cross-complaint against plaintiffs, defendants allege:

I.

That the United States of America conveyed to the defendant Great Northern Railway Company by patent July 24th, 1919, the title in fee simple to said West half of the Northwest quarter (W. $\frac{1}{2}$ NW. $\frac{1}{4}$) and Northwest quarter of the Southwest quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$) of said Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E. W. M., and that by deed, dated October 17th,

1919, said Great Northern Railway Company conveyed to the defendant Bellingham Bay Improvement Company the title in fee simple to said Northwest quarter of the Southwest quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$) of said Section Twelve (12); that said defendants are respectively the owners in fee simple of said tracts [208] of land; that the plaintiffs assert title thereto as stated in their second amended complaint, but that said claim of title is wholly unfounded both in law and equity, and constitutes a cloud upon the title of these defendants.

WHEREFORE, the defendants pray that the action of the plaintiffs be dismissed, and that said defendants have judgment against the plaintiffs that they, and all persons claiming or to claim by, through or under them, be perpetually debarred and restrained from asserting any right, title or interest in the above described land adverse to the title of the defendants, and that the title of said defendants to the lands respectively owned by them be quieted against the claim of the plaintiffs by decree of this court.

THOMAS BALMER,
EDWIN C. MATTHIAS,

Attorneys for Defendant, Great Northern Railway
Company.

C. W. HOWARD,
Attorney for Defendant, Bellingham Bay Improvement Company. [209]

State of Washington,
County of Whatcom,—ss.

C. M. Smith, being duly sworn on oath states:

That he is Vice-President of Bellingham Bay Improvement Company, one of the above-named defendants; that he has read the foregoing answer and cross-complaint, knows the contents thereof and that the same is true as he verily believes.

C. M. SMITH.

Subscribed and sworn to before me this 10th day of January, 1922.

C. W. HOWARD,

Notary Public in and for the State of Washington,
Residing at Bellingham.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, January 10, 1922. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [210]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE et ux.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and BELLINGHAM BAY IM-
PROVEMENT COMPANY, a Corporation,
Defendants.

Answer to Cross-complaint.

The plaintiffs, for answer to the cross-complaint of the defendants herein, admit that the United States conveyed to the defendants the legal title to

the land described in paragraph one of said cross-complaint; but they deny the defendants are the owners in fee simple of said land, and aver the fact to be that said defendants hold the said legal title to said lands in trust for the use and benefit of these plaintiffs, and not otherwise.

Further answering, these defendants allege they are the owners of said real estate and in possession thereof, and are entitled to receive the legal title to said lands conveyed to, and decreed to be in them.

WHEREFORE, they pray judgment as to their complaint, and for their title, and for all full and equitable relief.

S. M. BRUCE,
Attorney for Plaintiffs.

State of Washington,
County of Whatcom,—ss.

Albert R. McPhee, being first duly sworn on his oath says: That he is one of the plaintiffs; that he has read the foregoing answer and that the statements therein made are true as he verily believes.

Subscribed and sworn to before me this —— day
of February, 1922.

Notary Public, Bellingham, Washington.
Copy received 2/1/22. Verification waived.
THOMAS BALMER, For G. N. Ry. Co.,
C. W. HOWARD, For B. B. I. Co.,
Attorneys for Defendants.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern

Division. March 8, 1922. F. M. Harshberger,
Clerk. By Edith A. Handley, Deputy. [211]

In the United States District Court, for the Western
District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES Mc-
PHEE,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and BELLINGHAM BAY IM-
PROVEMENT COMPANY, a Corporation,
Defendants.

Statement of Evidence.

BE IT REMEMBERED, That on April 25th, 1922, this cause came on for trial before the Honorable Jeremiah Neterer, District Judge, at Bellingham, Washington, the plaintiffs appearing in person and by S. M. Bruce, their attorney, the defendant Great Northern Railway Company appearing by Thomas Balmer, its attorney, and the defendant Bellingham Bay Improvement Company appearing by C. W. Howard, its attorney, and thereupon the following proceedings were had and evidence given, to wit:

Mr. BRUCE.—After the ruling upon the motions to dismiss an answer and cross-complaint was filed, which puts in issue the basic facts upon which the

plaintiffs' claim rests in point of the occupancy and improvement of the land prior to the location of the scrip by the railroad company, and the proceedings in the Land Office and the disposition of the case there are admitted. So, as I take it, the only facts that come before the Court now are those which go to establish prior rights of occupancy or priority of claim.

Testimony of Alfred Foster Small, for Plaintiffs.

ALFRED FOSTER SMALL, called and sworn as a witness for plaintiffs, testified:

Direct Examination.

I have lived in Whatcom County since 1900. In 1901 I was living above Maple Falls. In August of 1901 I did some work for one C. C. Cole on the W. $\frac{1}{2}$ of Section 12, Township 39 North, Range 6 East. The first work I did was to start a wagon road [212] and build a trail going up to the claim and then started to erect cabin. The cabin was located about fourteen rods from the old Galbraith survey line, which would bring it pretty close into the second forty,—either in the southeast corner of the first quarter or the northeast corner of the second quarter. As near as I could judge by the new survey, the cabin would be in the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ or the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12. I laid the cabin up three logs high on one side and two, three, four or five logs high on the other. The cabin was habitable in character and fit to live in when completed. I built it for C. C. Cole as a homestead cabin.

(Testimony of Alfred Foster Small.)

The cabin was never completed while Cole had it. He sold his improvements to one by the name of Dan O'Donnell, and I did no work on the cabin after Cole parted with it. The cabin was afterwards completed. I think Herman Steiner completed it. He and O'Donnell worked together some. After it was completed Dan O'Donnell occupied it. He sold his improvements, as near as I can remember, in 1906, and in the meantime he occupied it and made it his home part of the time. He was hauling freight for the Excelsior Mine at the time and he would go up there and stop. Dan O'Donnell is now dead.

Cross-examination.

When I located the cabin it was by the old Galbraith survey and in speaking now of its location I am judging by the way the lines come now. Of course I never measured it exactly. I just went up there and measured the distance by judgment. I did the work for Cole in August and September of 1901. At that time there was no official survey of the land, but just the old Galbraith survey, which was a government survey that was not accepted, as near as I can understand. I speak of the location of the cabin, as near as I can judge, by way of the lines as they are there now, and I am not certain whether the cabin was in the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12 or SW. $\frac{1}{4}$ NW $\frac{1}{4}$ of 12. It is in either [213] one of the corners of those forties and is pretty close to the line. It would not be a great ways up. In 1909 after the official Government survey I paced it

(Testimony of Alfred Foster Small.)

and made a kind of an estimate of the distance of the old cabin from the north and south center line of the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12. (Map, marked Plaintiffs' Exhibit 1, was admitted in evidence.) This map, Plaintiffs' Exhibit 1, shows the S. $\frac{1}{2}$ of Section 1 and all of Section 12, of Township 39 North, Range 6 East. The string of forties in Section 12 on the left hand side of the map are the ones I have been speaking about and the cabin I built was either in the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12 or the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of that section, and I do not know by the new survey whether the cabin was in one of those forties or the other.

I know the land that McPhee is claiming at the present time. It is the old C. C. Cole home and is described as the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of 12, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of 12, and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of 12. The forties that lie just to the east of those were patented to John W. Thurston. I have an idea of where the north and south line runs between the claims of McPhee and Thurston. As near as I can judge of the location of the cabin with reference to the north and south line between the claims of McPhee and Thurston it would be about at the place marked with a cross on Plaintiffs' Exhibit 1, with the name "Cole" above it.

I was living up in that district from the time the cabin was built up to the year 1906. I spent twenty-six days on the trail and the cabin the time that I was working there in the summer of 1901. I was next on the land in 1902, while hunting, and I

(Testimony of Alfred Foster Small.)

stayed overnight where the cabin was. No one was then in the cabin besides myself. The cabin was not completed at that time. That was in the spring of 1902. It would be either in April or May—somewhere along that time. It was not a month later than I have stated. It was about the time that the bears were coming out of their holes. I cannot fix the exact time. [214] The cabin was not fully completed and no one was occupying it at that time. I was alone and camped over night alongside of the logs and the shakes. The logs for the walls of the cabin were laid up to a height of about five feet and a half or five feet eight. The roof and the rafters were not on, and the walls were just laid up, forming an open square.

The next time I was on the land was along in the fall or the first of the winter of 1902. I think the month of November. The cabin was then completed. No one was in the cabin at that time.

I think the next time I was on the land was about a year later—along in the fall of 1903. I stayed in the cabin over night at that time. Nobody was living there, but there had been somebody there, because there was canned food there, a bed, a mattress of gunny-sacks and a stove. I think that was my last trip to the cabin until 1909. From 1903 to 1909 I was not at the cabin, but I was across the claim.

I was present at the time of the transfer of the claim from Cole to O'Donnell, but not at the time of the transfer from O'Donnell to Thurston. Cole sold the claim to O'Donnell, as near as I can remem-

(Testimony of Alfred Foster Small.)

ber, in the latter part of October of 1901. They had talked the thing over before that, but I think the transfer was made in the latter part of October.

Redirect Examination.

The little drawing marked Plaintiffs' Exhibit 2 I made by memory in 1909. The forties marked C—C—C are the four forties that Cole held on the east side of Section 1 of the old Galbraith survey. By the new survey those are thrown on the west side of Section 12.

Recross-examination.

I made the map marked Exhibit 2 in 1909. After Thurston went on there I had an idea that I would be called as a witness, so I kind of made that rough sketch for reference. The land [215] that was claimed by Cole, according to the old Galbraith survey, was on the east side of Section 1—I should say Section 11. That would be the four east forties of Section 11. The land that Cole intended to claim was the land over in Section 11, according to the old survey. He had some notices put up showing what he claimed and they described it as the four east forties of Section 11, Township 39, Range 6. One of the notices was on a cedar tree right close to where I built that cabin. This cabin lay in Section 11 by the old survey. There were witness posts and witness trees on the section line, and part of the trail followed the line. I followed the line up. By the old survey the cabin lay in Section 11 on the east side and the four forties of land that Cole claimed lay in Section 11.

(Testimony of Alfred Foster Small.)

I am the same Alfred Small who was called as a witness by John M. Thurston and testified at the Land Office in Seattle in his case. I testified at that hearing that the improvements I built for Cole were on the Thurston claim. He claimed that forty. In his description he claimed the forty that had the cabin. He bought the whole lot off of O'Donnell—that is, his improvements, and then he claimed that forty in his description down there in the Land Office. I know the land that Thurston finally proved up on. It consists of four forties a mile long, north and south, and includes the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Section 1, the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of Section 12 and the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12. He dropped a forty that had a prior right on it and took a forty back of that. That is what he did. After we proved a prior right he dropped that. The forty that had the prior right that he first claimed was one of the C. C. Cole forties. At the time I was testifying for him I understood that he was only claiming one forty of what had formerly been claimed by C. C. Cole, and that was the forty that had the cabin on.

Redirect Examination.

When I testified in behalf of Mr. Thurston in the Land Office I understood that he was claiming a part of the C. C. Cole [216] entry. Cole held four forties in a string. One of the notices I spoke of seeing posted was on the south forty, which I call the back forty, because it is back further from the wagon road by which the land is approached on the north. That would be the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of 12. I

(Testimony of Alfred Foster Small.)

cannot remember now seeing any notice posted on any of the other forties.

Recross-examination.

When I found the notice just mentioned as being on the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, it then purported to be on Section 11 by the old survey, and it referred to Section 11 and not Section 12.

Testimony of Fred Benson, for Plaintiffs.

FRED BENSON, called and sworn as a witness for plaintiffs, testified:

Direct Examination.

I am a woods foreman and have lived at Glacier about eighteen years. I am acquainted with the W. $\frac{1}{2}$, Section 12, Township 39, Range 6 East. I was over it in 1904, but found no one living there. There was a cabin and I was in it. I saw the cabin again in 1910 and again in 1918. I have known Mr. McPhee since 1905. In the early part of 1909 he was living around Maple Falls. In 1910 he was living on a homestead that he had taken up in Section 12. He was living about twenty rods northeast of the original cabin that I spoke of. He lived there with his family until about 1917, if I remember.

Cross-examination.

I was not only on the land in 1904, 1910 and 1918, but at other intervals as occasion permitted. In 1910 I saw the same cabin I had seen on the land in 1904, but McPhee was never living in the old

(Testimony of Fred Benson.)

cabin at any time I was there. I do not say that McPhee and his family¹ lived continuously on this land from 1910 to 1917. They came out sometimes in the winter, but were there through the summer almost continuously. While McPhee was living on the land he was cutting shingle bolts on it part of [217] the time. He cleared about one acre and slashed about two. Besides cutting shingle bolts I don't know what he was doing between 1910 and 1917 any more than just any common labor—working around wherever he could find a day's work. He was putting in all his time on the claim besides what he was making his living.

Testimony of Peter Beebe, for Plaintiffs.

PETER BEEBE, called and sworn as a witness for plaintiffs, testified:

Direct Examination.

I live at 202 Chestnut Street, Bellingham. In 1906 I was living in Maple Falls. I lived in that neighborhood probably twelve or fourteen years, and made entry of a homestead consisting of two forties in Section 1 and two forties in Section 12. I traded with Jack Thurston and gave him a forty in Section 1 where his house is now, down by the railroad, and I took three forties then in Section 12 in a string. I had the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Section 1, and the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Section 12, and then I traded the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1 and the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Section 12, and took three forties in Section 12,

(Testimony of Peter Beebe.)

described as the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Section 12 and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12. Thurston gave me fifty dollars for a place to build his house down at the railroad. After that I took up the land in Section 12 for my homestead and filed on it, in the Land Office. Afterwards I relinquished the three forties in Section 12 to McPhee and proved up on the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1. McPhee gave me fifty dollars for the right. There was a cabin on what I gave to McPhee, but I don't know who built it. I didn't see any cabin on any of the other lands that I had. I know the land that Thurston proved up on. I didn't see any cabin on any of those forties. It was five or six years after I made the trade with Thurston that I made the trade with McPhee. I lived there long enough to prove upon the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 1. After I relinquished the remainder of my claim to McPhee he built a house on Section 12. I was up there once and McPhee and his wife and two boys were there. I don't know how long they lived there. [218]

Cross-examination.

I haven't lived up in that section of the country since 1911 or 1912. I first took up a homestead in 1907 and at that time the land was officially surveyed. In speaking of these different subdivisions of land I speak of them as they lie according to the accepted survey.

**Testimony of Fred Benson, for Plaintiffs
(Recalled).**

FRED BENSON, recalled as a witness for plaintiffs, testified:

Direct Examination.

It was in August of 1904 that I visited the cabin we have been discussing. It was in fairly good condition and contained a cook-stove, some canned goods, a home-made table, a bunk and a mattress made out of boughs with a gunny-sack over it. From the indications I would say that it had been recently occupied. I saw a notice on the door, the substance of which was that Mr. Dan O'Donnell, if I remember rightly, had taken that for a homestead, and gave the description. I don't remember the exact description it gave that he was taking, but he was taking that as a homestead.

Cross-examination.

I don't know what description of land was claimed by the notice. That was in 1904, before the time of the official survey, and I could not say whether the notice said that O'Donnell claimed land in Section 11 or Section 12.

**Testimony of Alfred Foster Small, for Plaintiffs
(Recalled).**

ALFRED FOSTER SMALL, recalled as a witness for plaintiffs, testified:

Direct Examination.

I spoke this morning of seeing some notices

(Testimony of Alfred Foster Small.)

posted on the land that had been claimed by Cole. One of them was on a cedar tree close to the cabin. It was a C. C. Cole notice, and another one on the south forty was also a C. C. Cole notice. I saw those [219] notices in 1901, and I last saw the remains of them in 1903. They were written on paper pasted on a cardboard and tacked on a tree. The sum and substance of the notices was that he claimed that as his homestead. The description was the NE.1/4 NE.1/4 Section 11 and then it was the four forties following up.

There was a Dan O'Donnell notice on the door which I last saw in 1903. It described that land as his homestead and was signed by D. O'Donnell. I saw that notice on the cabin more than once. O'Donnell and I went up to the cabin together at one time. The house was provisioned and we had something to eat when we were there.

I spoke this morning of having made my home with a man by the name of Headrick, and I saw O'Donnell about there. He was freighting for the Excelsior Mine and he slept up to his cabin. He went up the trail at night after he left the team there at Headrick's place and said he was going to his cabin. At about seven o'clock in the morning he would come down the trail that went up to his cabin.

The land upon which these notices were posted describing it as being in Section 11 was the ground that Cole had posted on and that O'Donnell was occupying. O'Donnell's practice of going up in the

(Testimony of Alfred Foster Small.)

evening to his cabin and coming down in the morning continued about three weeks. He then went to Steiner's and left his team there a while. After he went to Steiner's I would see him sometimes once a week and sometimes once in ten days. He still continued to go up to his cabin to sleep when he was at Steiner's, as he had at Headrick's. I don't know how long that continued at Steiner's. O'Donnell finished building the cabin when I left there and he had a kind of slashing around the cabin. [220]

Cross-examination.

It was in 1901 and 1902 that O'Donnell was freighting for the Mine. It was in 1902 that he went up at night when he was freighting, and I knew of that for about three weeks. So far as his being there when I was also there is concerned, that happened only once. That was in the winter of 1901 and 1902. It was before the cabin was completed. It had a roof on it at that time, but the floor was not all laid.

Testimony of J. H. Cannon, for Plaintiffs.

J. H. CANNON, called and sworn as a witness for plaintiffs, testified:

Direct Examination.

I have resided in Maple Falls since 1900 and was acquainted with Dan O'Donnell in his lifetime. I know that in 1902 he was claiming a homestead up in Section 12, as I recollect. I don't know exactly how long he was up there. I met him several times,

(Testimony of J. H. Cannon.)

and in particular I met him one time in April, 1902. He was teaming for the Excelsior Mine and I came down with him. It seems to me that he stopped at Steiner's and he showed me where his trail went up to his homestead. He was around there teaming and one thing and another for a year or two, and he came to Maple Falls, as I recollect, to get his loads to haul them to the Excelsior Mine. He stayed at Steiner's or at Headrick's.

In 1909 or 1910 I was on Mr. McPhee's homestead claim. McPhee was living up there and we went to the cabin that was pointed out to me as the O'Donnell cabin. I cannot say that I saw any notice of postings. McPhee was measuring the lines as to where this cabin was, and as I recall it was the new line. The cabin was on the land that Mr. McPhee claimed according to the new line. I cannot just recall how many rods, but it was several rods in Mr. McPhee's favor. [221]

Cross-examination.

This cabin was on one certain quarter of 12, as I recall, and from my recollection it was between eleven and twelve rods from the south line which came upon Mr. McPhee's land. There was a question in my mind whether the old survey line was in front of it or not, but from my recollection it was, but I am not positive of that.

Redirect Examination.

I know that the survey was shifted. The old line was not in the same place that the new lines were. It seems to me that the old lines were further east.

**Testimony of Albert Raymond McPhee, for
Plaintiffs.**

ALBERT RAYMOND MCPHEE, one of the plaintiffs, called and sworn as a witness, testified:

Direct Examination.

I will be forty-seven years of age next June. I live in Glacier and have lived in Whatcom County since October, 1901. I bought a relinquishment from Peter Beebe in the fall of 1909 of the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Section 12, and I went on there and built a house and then I done some falling of trees around the house that winter, and my family moved in the first of March. After purchasing the relinquishment, I began work on the house right away. I spent the winter there and hired Mr. Magner to help me. We started the building and built some trails. There was a cabin on the land fifteen or twenty rods above my house towards the west. I know where the Government lines were run by the last survey, and that cabin is on the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$. It is not very far over the north line of the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Section 12 and it is close to thirty rods west of the line between me and Mr. Thurston. When I went up there and took possession of the ground the old cabin was in pretty fair shape. There were some boards off of one gable end, but aside from that it was in habitable condition. I had a couple of shingle bolt cutters that were cutting [222] bolts up there for me, living in it. They batched in it and then I used it for other purposes afterwards. The following

(Testimony of Albert Raymond McPhee.)

March I moved my family up to my present cabin. We stayed there until 1917 or 1918. I used to go away and work in the summer time and my wife used to work as a cook in the winter time while I was staying home on the homestead. I cleared about three acres, and my object in taking possession was for a homestead. I am a citizen of the United States. My furniture and part of my cooking utensils are still in the house. In February, 1918, we went down to Fobes to work and I left the bed and everything there because I used to go up and put in the garden, and then after the railroad company had got a patent to it I had whatever ground I had plowed up and seeded in oats and then after I got the oats I seeded it down and let clover and grass grow on it.

Testimony of Mrs. Hannah Kline, for Plaintiffs.

Mrs. HANNAH KLINE, called and sworn as a witness for plaintiffs, testified:

Direct Examination.

I live at Deming. Dan O'Donnell was my oldest brother. He died on the 28th day of February, 1920, at the age of forty years. In 1901 and 1902 and 1903 he was working at the Mines up there doing teaming. He claimed a homestead up there. I would not be certain about the time. I don't know the description of the ground. He and my father were born in Ireland. My father was a naturalized citizen. He took up a homestead thirty-six years ago.

(Testimony of Mrs. Hannah Kline.)

Cross-examination.

The family home while my brother Daniel was a man in his early twenties was at Lawrence, Washington, twelve miles out of Bellingham and four miles this side of Deming. At the time that my brother had his homestead claim he made his home practically with us week-ends and he worked at the mines there for a time. I don't just remember how long, because I wasn't home there all the time. He did not at any time go and live for any considerable [223] period on his homestead, but made his home with his father and the remainder of the family at his father's home. I don't know where he voted that certain year, but I know that he always did vote at Lawrence when we were living in Lawrence. Our family moved to Lawrence in January, 1900, and lived there for nine years, and during that time my brother made that place his home. It is with reference to those nine years that I spoke of knowing where he was accustomed to vote, and during those years, so far as I know, he voted at Lawrence. He was never gone from home to make his home away from the family home for any length of time during that period. He would go away to work, but he never went away to make his home away from home. My brother was not married until just a year or two before his death.

Redirect Examination.

I know that my brother did claim a homestead up there by Maple Falls. He always talked of coming home or being at home with his parents as long

(Testimony of Mrs. Hannah Kline.)

as he lived, and he always spoke of his parents' home as being his home.

I would not say for sure how many times he voted at Lawrence, but I know that he used to go and vote occasionally. I would not say whether he voted at every election or not. I just have in mind that he did vote there at Lawrence.

Recross-examination.

I cannot say for certain how long my brother spoke of claiming this homestead, but I believe it was something like a year. He didn't speak of claiming it for a period as long as four or five years. He gave it up about a year after he first claimed it. I was too young to understand very much about it at the time, but I remember he and father talking about it when the scrip was put on the land up there and father told him that he didn't think there was any use in fighting it, that he might just as well give it up, so he didn't bother with it any more. After that conversation he made no effort to hold a homestead. [224]

Redirect Examination.

This conversation was something about a scrip. Up to that time he claimed it as a homestead, and after the railroad placed the scrip there he became discouraged.

Re-recross-examination.

I know father never encouraged him on the homestead. It was so far from home and he didn't feel like staying there like he should, and all I can be

(Testimony of Mrs. Fannie McPhee.)

sure father said was, "Now there is no use trying to fight the scrip. You might just as well give it up." That is all that I can remember about it.

Testimony of Mrs. Fannie McPhee, for Plaintiffs.

Mrs. FANNIE MCPHEE, one of the plaintiffs, called and sworn as a witness, testified:

Direct Examination.

We moved upon our homestead in 1910. Our family consisted of three children and my husband and myself. Mr. McPhee first went up there to build in the fall of 1909. I was then running the cook-house for Mr. Thurston at Warnick and moved up to the claim in the spring of 1910. We were there until 1917. Of course I was not there steady. I was away at work at times and my husband was there those times. Our purpose in going up was to make it a homestead. We moved part of our furniture out of the place about four years ago, but enough is left so that we can always go up there and live.

Mr. BRUCE.—I wish to introduce in evidence the exhibits attached to the second amended complaint.

The COURT.—Very well.

(Whereupon the documents referred to were introduced in evidence as Exhibits "A" and "B.")

Mr. BRUCE.—If your Honor please, before finally resting, if it should become important I have a stipulation with counsel that the naturalization

papers of Mr. O'Donnell may be furnished later.

Plaintiffs rest. [225]

DEFENDANTS' CASE.

Mr. BALMER.—The defendants offer in evidence a certified copyⁱ from the United States General Land Office of the St. Paul, Minneapolis and Manitoba Railway Company's selection list number forty-four.

The COURT.—It may be admitted.

(Whereupon document referred to was admitted in evidence as Defendants' Exhibit "A.")

Mr. BALMER.—The defendants offer in evidence as their exhibit "B," a certified copy from the United States General Land Office at the St. Paul, Minneapolis and Manitoba Railway Company's selection list number forty-four A.

The COURT.—That will be admitted.

(Whereupon document referred to was admitted in evidence as Defendants' Exhibit "B.")

Mr. BALMER.—The defendants offer in evidence as their exhibit "C" a certified copy from the General Land Office of clear list number forty-three of the Great Northern Railway Company, successor of the St. Paul, Minneapolis and Manitoba Railway Company, in so far as it relates to certain lands shown in the list.

The COURT.—It may be admitted.

Mr. BALMER.—Including the lands in controversy here.

(Whereupon document referred to was admitted in evidence as Defendants' Exhibit "C.")

Mr. BALMER.—The defendants offer in evidence as their exhibit “D” a certified copy of the patent from the United States of America to the Great Northern Railway Company to the land in controversy in this case, and other lands.

The COURT.—It will be admitted.

(Whereupon document referred to was admitted in evidence as Defendants’ Exhibit “D.”) [226]

Mr. BALMER.—The defendants offer in evidence as their exhibit “E” a certified copy from the office of the United States Surveyor General for Washington of the plat of Township 39 North of Range 6 East of the Willamette Meridian.

The COURT.—It may be admitted.

(Whereupon document referred to was admitted in evidence as Defendant’s Exhibit “E.”)

Mr. BALMER.—The defendants offer as their exhibit “F” a certified copy from the same Surveyor General Office of the field-notes of the survey of Section 12, Township 39 North of Range 6 East of the Willamette Meridian.

Mr. BRUCE.—No objection.

The COURT.—It may be admitted.

(Whereupon document referred to was admitted in evidence as Defendants’ Exhibit “F.”)

Mr. BALMER.—The defendants offer in evidence as their exhibit “G” a copy of the Mount Baker Quadrangle of the United States Geological Survey, and in connection with that a copy of the adjoining quadrangle of the same survey. The reason for offering the two is that the first, which includes the land in controversy, is drawn on a small scale

and it does not have the Government division lines extended. It is necessary therefore to read it in connection with the adjoining quadrangle which has the survey lines on it extended.

Mr. BRUCE.—To that I object as being immaterial. They have now the Surveyor General's field-notes.

The COURT.—It may be filed, and I will reserve the ruling on that.

Mr. BALMER.—Those are official publications, your Honor.

The COURT.—Well, these may be admitted.

(Whereupon documents referred to were admitted in evidence as Defendants' Exhibit "G" and "H," respectively.) [227]

Testimony of Alex Stewart for Defendants.

ALEX STEWART, called and sworn as a witness for defendants, testified:

Direct Examination.

I am employed in the Engineering Department of the Great Northern Railway Company, and am the author of the map marked Plaintiffs' Exhibit 1. The contour lines on that map are from the United States Geological Survey maps that have been introduced in evidence as Defendants' Exhibits "G" and "H." The subdivision lines and the creeks are from the township map. I visited the land in controversy a week ago to-day. There was a cedar shake cabin that I noticed and then there was one that had fallen down further west. The collapsed cabin was four hundred and twenty-seven

(Testimony of Alex Stewart.)

feet in a southwesterly direction from the standing cabin. I examined in connection with the official government survey and in connection with the field notes of the survey of Section 12. I have observed the references in those field-notes to the destruction of the old monuments. According to the old survey the old cabin would have been in Section 11. It would be a question whether it would be in the southeast or the northeast forty of the northeast quarter of Section 11. According to the old survey the east line of Section 11 was moved approximately eight hundred twenty-five feet in that particular corner. That would be offhand from fifty to fifty-five rods. I have indicated on Plaintiffs' Exhibit 1 the location of the old corner of Sections 1, 2, 11 and 12 of Township 39. Although the lines would not be precisely parallel in a general way the relationship of the corners will be substantially the same, so that there would be a similar change in the location of the other corners of Section 12.

Testimony of David Russell, for Defendants.

DAVID RUSSELL, called and sworn as a witness for defendants, testified: [228]

Direct Examination.

I live at Hamilton, Skagit County, Washington. My business is a cruiser. I am sixty-seven years old. I selected land in Section 12, Township 39 North, Range 6 East, for the St. Paul, Minneapolis and Manitoba Railway Company. I was employed by G. B. Peavey, and I selected vacant land on the

(Testimony of David Russell.)

old survey. I selected the lands which are described as the $W.1\frac{1}{2}$ NW. $\frac{1}{4}$, Section 12, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Section 12, Township 39, Range 6. At that time there was a survey in that country different from the final accepted government survey. I selected the land described some time the last of April or along about the first of May, 1902. Thomas Thompson was with me in doing the work. The northerly end of this land is close to the road and close to the Nooksack River. We started our work from the north and first located the northwest corner of Section 12. From that point we went east twenty rods along the section line and then worked south to the section line on the south of 12. I checked my compassman on the quarter post to see how his bearing was with the Government survey, and then we would go on through to the section corner and check that. In that way we ran south on a line parallel to and twenty rods from the west line of Section 12 until we got to the south line of the section, and then we went forty rods and came back through that same row of forties twenty rods from the east line of it and sixty rods from the west line. The object of working through the land in that way was to split each twenty acres and have ten acres on each side of the compassman to estimate. There are four tallies across the forty. The tally would be twenty rods. When we got down ten rods I would stop there and kind of figure the timber. When he called the first tally I would

(Testimony of David Russell.)

mark that down and go on to the next. That was our system of estimating at that time.

Working south on the first line through Section 12, when we came to a point opposite the quarter post we would pace back [229] to the quarter post, so that I could see if my compassman had about the same bearing that the section line was running on and how he was pacing out. We did the same thing when we came to a point opposite the section corner. We went over to the monuments and when we came to those marked corners or quarter posts we examined them for notices. Also as we were running along our course we took observations of trails or improvements. If there were improvements there I made a note of it. If I would strike a trail I would investigate and would go out that trail to the section line to see if there were any improvements along the trail. While I was doing that work I selected no land on which I found improvements or a cabin. My instructions from Mr. Peavey were to pass up all claims of forties that had improvements on, and where they had their notices posted on the cabin why I was to pass up the claim—whatever the notice described. In my examination of these three forties I found no evidence of occupation by anyone and no cabin or improvements of any kind; nor do I remember of any notices being there. We would do the work of cruising that land in a day. We were on an eager lookout for improvements while doing the

(Testimony of David Russell.)

work and our object was to avoid land on which there were improvements, so as to avoid conflicts.

Cross-examination.

I was paid by the day, and not according to the stumpage I located. I started from the northwest corner of Section 12, according to the old survey, and then ran east along the north line twenty rods, then south parallel to the west line, then east forty rods and came back. As nearly as I could I followed a direct compass line to the south boundary of the section, and every forty rods I stopped and went around and took in what would probably equal an acre of ground and counted the trees. I would then average the five acres by that. When I had accomplished that task my work was done so far as that particular ground was [230] concerned, except making out my reports and sending them in.

Testimony of Thomas Thompson, for Defendants.

THOMAS THOMPSON, called and sworn as a witness for defendants, testified:

Direct Examination.

I am a deputy forest supervisor in the United States Forest Service. I have been employed in that department eighteen years. I assisted David Russell in the work he did in locating land in Section 12, as he has testified. I was running the compass for him, and corroborate the testimony that has been given by Mr. Russell.

(Testimony of Thomas Thompson.)

Cross-examination.

When we were doing this work we were camped at several different places up there.

Testimony of Garry B. Peavey, for Defendants.

GARRY B. PEAVEY, called and sworn as a witness for defendants, testified:

Direct Examination.

I live at Seattle and my business for a number of years past has been timber lands and lumber. I have been in the timber land business in the State of Washington thirty-two years and a half, and followed the same line of business in the east before coming out here. In the year 1902 I was engaged by the St. Paul, Minneapolis and Manitoba Railway Company to select land in lieu of the lands that they lost when they built the road up the Red River of the North. I employed David Russell in that work and I filed most of the selection lists of the land that was chosen for the Railway Company in Seattle Land Office.

Referring to the certified photographic copy of Great Northern selection list No. 44 (Defendants' Exhibit "A"), I will state that that list was prepared and filed by me. The bold handwriting is mine and covers what was on the list when I filed it. The fine handwriting and notations were not on the list when I filed it. My instructions to Mr. Russell with reference to [231] the selection of lands were to go out and examine all the vacant unoccupied land and not to have anything to do

Testimony of John W. Thurston.)

with any that had cabins on it. I myself never went over the land in controversy.

Testimony of John W. Thurston, for Defendants.

JOHN W. THURSTON, called and sworn as a witness for defendants, testified:

Direct Examination.

My present residence is in Bellingham. I lived from 1906 to 1917 on a homestead in Section 12, Township 39, Range 6. There were four forties lying north and south, one in Section 1 and the other three in Section 12. I obtained a patent of that land from the Government. I started to build in December 1906 and left there in the fall of 1917, and raised my family right there. I was familiar prior to 1917 with the land now claimed by Mr. McPhee, adjoining my homestead on the west. To reach that land one goes right straight up through my place direct south of the road. Mr. McPhee was working for me before he took up his claim. Mr. McPhee and his family went there in the spring of 1910. In the summer-time they were up there all the time until about 1912 or 1913. They were only there a couple of years, and then the place was deserted for a year or two, and then they moved back once in 1915 for the summer only.

Testimony of Mrs. Lena Thurston, for Defendants.

Mrs. LENA THURSTON, called and sworn as a witness for defendants, testified:

Direct Examination.

I am the wife of John W. Thurston. Our homestead near Glacier in Section 12, Township 39, Range 6, adjoins the land that is claimed by Mr. McPhee. I remember that McPhee bought Beebe out in 1909. We lived on our claim from 1909 to 1917. People going to and from the McPhee place crossed our homestead. McPhee's lived there a good deal of the time in 1909, and then they were off and on that place most of the time until 1915, and from that time on I have no knowledge of them living on the place [232] at all, because the road was always blocked. When we would be going up there in the summer-time to pick berries the road was always blocked with windfalls and brush and everything, and we had to go around the trail.

Cross-examination.

I think it was in 1909 that McPhee's first moved up there and they were on their claim that entire summer. I never was inside the McPhee house, but I have been close to it. I was not on visiting terms with the McPhees and there was trouble between our families.

Defendants rest.

Testimony of Albert Raymond McPhee, for Plaintiff (Recalled—In Rebuttal.)

ALBERT RAYMOND MCPHEE, one of the plaintiffs, recalled as a witness on rebuttal, testified:

Direct Examination.

The house I built on my homestead was fourteen by fifteen and I also built a chicken-coop about twenty-five feet long and twelve feet wide, and a root house about fourteen feet square. I planted eighteen orchard trees which commenced to bear in the summer of 1915. I stayed on my homestead until the summer of 1914. In the summer of 1913 Mr. Christie logged Thurston's claim and I worked for him, because all I had to do was to just go down from my house to Thurston's claim and when the day was over I could go right home. In the summer of 1914, after I had put in my garden truck, I went to work for Mr. Polson in the coal mine, and I worked there in the summer of 1914 and the winter of 1915, and I got hurt and was in the hospital for about two months. My wife was down there taking care of me and my two boys and girls stayed there on the place all that winter. That was in 1915. In the summer of 1916 I worked on the railroad section, so that I could get up home over night. When I was [233] working out that way it was for the purpose of getting money to sustain my family. I used to work on my homestead after working hours. I kept chickens and a cow on the place and a nice bunch of turkeys one sum-

(Testimony of Albert Raymond McPhee.)

mer. After I went on that place I never maintained a home any other place than there, and I was at no time absent for a period of three or six months.

Cross-examination.

I never left that place more than three months at a time after establishing my residence, unless I was working some place and didn't get home. My family was there when I was working at the coal mine. This old cabin that is supposed to have been occupied by O'Donnell is the cabin that is broken down now. It was made of split cedar logs and lied a few rods back of my house, or to the west. The roof broke in about two years ago. I think one side of the roof was smashed in with snow. When the bolt cutters were batching in there the pipe caught fire and burned the rafters a little and when the heavy snow came on that side broke in. That is the O'Donnell cabin.

Testimony closed.

Mr. BALMER.—Defendants at the close of all the evidence in the case move to dismiss the action, upon the ground that the evidence fails to establish the cause of action set forth in the second amended complaint, or any cause of action, and totally fails to show that plaintiffs are entitled to any equitable relief.

The COURT.—That will be taken under advisement with the balance of the matter. [234]

Certificate of Judge Approving Statement of Evidence.

The defendants having on the 30th day of October, 1922, lodged the foregoing statement of evidence with the Clerk of the above-entitled court, and notified the plaintiffs of such lodgment, and having given the plaintiffs ten days' notice of the time and place when they would ask the Court to approve said statement, and said statement being now, at the time and place stated in said notice, presented to the Court and no objections made and amendments proposed by any party, and said statement being found by the Court true, complete and properly prepared, the same is hereby approved, settled and allowed as a true and complete statement of the evidence, and is directed to be filed in the Clerk's office and become a part of the record for the purposes of appeal.

Done in open court this 10th day of November, 1922.

JEREMIAH NETERER,

District Judge.

The foregoing statement of evidence having been settled and approved by the Court, it is hereby engrossed by the party proposing it.

THOMAS BALMER,

Solicitor for Great Northern Railway Company.

CLINTON W. HOWARD,

Solicitor for Bellingham Bay Improvement Company.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. October 30, 1922. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy.

[Endorsed]: Refiled in the United States District Court, Western District of Washington, Northern Division. November 10, 1922, as Settled by the Court. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [235]

In the United States District Court for the Western District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RY. CO., a Corporation,
and BELLINGHAM BAY IMPROVE-
MENT CO., a Corporation.

Decision.

Filed September 7, 1922.

THOMAS BALMER and CLINTON HOWARD,
Attorneys for Defendants.

S. M. BRUCE, Attorney for Plaintiff.

NETERER, D. J.—I have read the briefs and examined the record and have in mind the testimony of the witnesses at the time of the trial, and I am

convinced by the evidence that the plaintiffs have sustained the fact contended for in the bill of complaint, and my view of the law having heretofore been expressed in opinions filed a decree may be presented in favor of the complainants as prayed for.

NETERER,
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. September 7, 1922. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [236]

In the United States District Court for the Western District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corporation,
Defendants.

Decree.

This cause having been heretofore submitted to the Court for judgment, evidence having been taken and counsel heard, and the Court having duly considered the same and being fully advised, does find

that all the allegations of the complaint are true and fully proven, and it is now ORDERED, ADJUDGED AND DECREED by the Court that plaintiffs are the owners and in possession of the following described lands and tenements, to wit:

The West half of the Northwest Quarter (W. $\frac{1}{2}$ NW. $\frac{1}{4}$) and Northwest Quarter of the Southwest Quarter (NW. $\frac{1}{4}$ SW. $\frac{1}{4}$) of Section Twelve (12) Township Thirty-nine (39) North in Range Six (6) East of W. M. in Whatcom County, Washington.

That the defendants hold the legal title to such lands in trust for the plaintiffs whose right to the said title are superior and prior to the defendants, and said title is now and hereby directed to be and is vested in the plaintiffs Albert R. McPhee and Frances McPhee free of any and all claims of the defendants and either of them or those claiming by, through or under them.

It is further DECREED AND ADJUDGED that plaintiffs have judgment for their costs herein accrued and to accrue in the sum of \$62.90 dollars, to be taxed by the clerk of this Court. [237] All of which is finally ordered, adjudged and decreed.

This day of 3d, 1922.

JEREMIAH NETERER,
Judge.

Copy rec'd Sept. 26, 1922.

C. W. HOWARD,
For B. B. I. Co.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division, October 3, 1922. F. M. Harshberger,
Clerk. By Edith A. Handley, Deputy. [238]

In the United States District Court for the West-
ern District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corpora-
tion,

Defendants.

Petition for Appeal.

To the Honorable JEREMIAH NETERER, Judge
of the Above-entitled Court:

The above-named defendants, feeling themselves
aggrieved by the decree in favor of the plaintiffs
made and entered in this cause on the third day of
October, 1922, do hereby appeal from said decree
to the Circuit Court of Appeals of the United States
for the Ninth Circuit, for the reasons specified in
the assignment of errors, which is filed herewith.
The said defendants pray that their appeal be al-
lowed and that citation issue, as provided by law,
and that a transcript of the record, proceedings
and papers upon which said decree was based, duly
authenticated, may be sent to the United States Cir-
cuit Court of Appeals for the Ninth Circuit.

And the defendants, desiring to supersede the execution of the decree, here tender bond in such amount as the Court may require for such purpose, and pray that with the allowance of the appeal a supersedeas be issued.

THOMAS BALMER,
Solicitor for Great Northern Railway Company.

CLINTON W. HOWARD,
Solicitor for Bellingham Bay Improvement Com-
pany. [239]

Order Allowing Appeal.

The appeal is allowed and shall operate as a supersedeas upon the petitioner's filing a bond in the sum of five hundred dollars (\$500.00), with sufficient sureties to be conditioned as required by law.

Done in open court this 14th day of November, 1922.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. November 14, 1922. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [240]

In the United States District Court for the Western District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES McPHEE,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and BELLINGHAM BAY
IMPROVEMENT COMPANY, a Corporation,
Defendants.

Assignment of Errors.

NOW COME the Great Northern Railway Company, a corporation, and Bellingham Bay Improvement Company, a corporation, defendants and appellants in the above-entitled cause, and make and file the following assignment of errors:

I.

The District Court erred in overruling the separate motions of the defendants to dismiss the action upon the ground that the second amended bill of complaint failed to state facts sufficient to constitute a valid cause of action in equity.

II.

The District Court erred in making and entering its final decree, dated October 3d, 1922, adjudging that the defendants hold the legal title to the lands in controversy in trust for the plaintiffs, and quieting the title of the plaintiffs to said lands against

the claims of the defendants and those claiming under them.

III.

The District Court erred in refusing to enter a decree quieting the title of the defendants to the lands respectively claimed and held by them against the claim of the plaintiffs, as [241] prayed in the defendants' cross-complaint.

IV.

The District Court erred in refusing to hold and decide upon the motions to dismiss that the only question presented by the second amended complaint was a question of fact as to whether or not any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the Railway Company, and that said question of fact had theretofore been submitted to and determined by the United States Land Department and was therefore not within the jurisdiction or power of the District Court to re-examine or determine in this suit.

V.

The District Court erred in refusing to hold and decide upon the final hearing that the only question presented by the pleadings and proof was a question of fact as to whether any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the Railway Company, and that said question of fact had theretofore been submitted to and determined by the United States Land Department and was therefore not within the jurisdiction or

power of the District Court to re-examine or determine in this suit.

VI.

The District Court erred in refusing to hold and decide upon the motion to dismiss that the second amended complaint totally failed to show that any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the St. Paul, Minneapolis & Manitoba Railway Company. [242]

VII.

The District Court erred in refusing to hold and decide upon the final hearing that the evidence totally failed to show that any adverse right or claim to the land in controversy had attached or been initiated at the time of the selection of said land by the St. Paul, Minneapolis & Manitoba Railway Company.

VIII.

The District Court erred in refusing to hold and decide upon the motions to dismiss and upon all the evidence in the case, that upon the abandonment or disposal of the land in controversy by the claimants prior to the plaintiff, the pending, but unapproved, selection list of the St. Paul, Minneapolis & Manitoba Railway Company attached to said lands, and immediately segregated them from subsequent entry or claim by plaintiffs or their predecessors, as public lands under the homestead laws.

IX.

The District Court erred in refusing to hold and

decide that the adjudication of the United States Land Department against the claim of the plaintiff's predecessor Beebe, immediately prior to Beebe's relinquishment in favor of the plaintiffs, permitted the pending, but unapproved, selection list of the Railway Company to attach to the lands in controversy, and precluded the initiation of any right or claim thereto as public lands by the plaintiffs under the homestead laws.

X.

The District Court erred in holding and deciding upon all the evidence in the case that the plaintiffs were in any event entitled to prevail as to any of the land in controversy other than the Southwest quarter of the Northwest quarter (SW. $\frac{1}{4}$ NW. $\frac{1}{4}$) [243] of Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., since there is no evidence whatsoever showing, or tending to show that any of the other land in controversy was occupied or claimed by any person whomsoever at or prior to the time of the filing of the selection list by the Railway Company.

XI.

The District Court erred in refusing to hold and decide that in no event could the plaintiffs prevail as to any of the land in controversy now lying in Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., except the portion thereof previously known and described as part of Section Eleven (11), said township and range, and occupied or claimed under the homestead laws of the United States by some predecessor of the

plaintiffs at the time of the filing of the Railway Company's selection list.

Dated this 14th day of November, 1922.

THOMAS BALMER,
Solicitor for Defendant, Great Northern Railway
Company.

CLINTON W. HOWARD,
Solicitor for Defendant, Bellingham Bay Improve-
ment Company.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. November 14, 1922. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [244]

In the United States District Court for the West-
ern District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE and FRANCES Mc-
PHEE,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and BELLINGHAM BAY IM-
PROVEMENT COMPANY, a Corporation,
Defendants.

Bond.

KNOW ALL MEN BY THESE PRESENTS,
That we, Great Northern Railway Company, a cor-
poration of the State of Minnesota, and Bellingham

Bay Improvement Company, a corporation of the State of Washington, as principals, and National Surety Company, a corporation of the State of New York, licensed to act as surety in the State of Washington, acknowledge ourselves to be jointly and severally indebted to Albert R. McPhee and Frances McPhee, husband and wife, plaintiffs in the above-entitled suit, in the sum of Five Hundred and No/100 Dollars (\$500.00), for the payment of which well and truly to be made, we bind ourselves, and our, and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of November, 1922.

Upon the condition, nevertheless, that:

WHEREAS, on the third day of October, 1922, in the District Court of the United States, for the Western District of Washington, Northern Division, in a suit depending in that court, wherein the said Albert R. McPhee and Frances McPhee, husband and wife, are plaintiffs, and the said Great Northern Railway Company and Bellingham Bay Improvement Company are defendants, numbered on the Equity Docket as No. 13—E, a decree was rendered in favor of the said plaintiffs and against the said defendants, and the said [245] defendants having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court, to reverse the said decree, and a citation directed to the said Albert R. McPhee and Frances McPhee, citing and admonishing them to be and ap-

pear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco in the State of California, on the 14th day of December, A. D. 1922, next.

Now, if the said Great Northern Railway Company and Bellingham Bay Improvement Company shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

GREAT NORTHERN RAILWAY COMPANY.

By THOMAS BALMER,
Its Solicitor.

BELLINGHAM. BAY IMPROVEMENT
COMPANY.

By CLINTON W. HOWARD,
Its Solicitor.

NATIONAL SURETY COMPANY.

By _____,
Resident Vice-President.
J. GRANT,

Resident Assistant Secretary.

The foregoing bond and the surety thereon is hereby approved this 14th day of November, 1922.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. November 14, 1922. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [246]

In the United States District Court, for the Western District of Washington, Northern Division.

No. 13—E.

ALBERT R. McPHEE, and FRANCES McPHEE,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and BELLINGHAM BAY IMPROVEMENT COMPANY, a Corporation, Defendants.

Citation.

The President of the United States of America, to Albert R. McPhee and Frances McPhee, Husband and Wife, GREETING:

YOU ARE HEREBY NOTIFIED, That in a certain case in equity in the United States District Court in and for the Western District of Washington, Northern Division, wherein you, the said Albert R. McPhee and Frances McPhee are complainants, and Great Northern Railway Company, a corporation, and Bellingham Bay Improvement Company, a corporation, are defendants, an appeal has been allowed the defendants therein to the United States Circuit Court of Appeals for the Ninth Circuit.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in said court at the city of San Francisco in the State of California thirty

days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, Northern Division, this 14th day of November, A. D. 1922.

JEREMIAH NETERER,
United States District Judge.

Due and timely service of the foregoing citation is hereby acknowledged at Bellingham, Washington, this 15th day of November, 1922.

S. M. BRUCE,
Solicitors for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. November 16, 1922. F. M. Harshberger, Clerk. By Edith A. Handley, Deputy. [247]

[Endorsed]: No. 3952. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, and Bellingham Bay Improvement Company, a Corporation, Appellants, vs. Albert R. McPhee and Frances McPhee, Appellees. Transcript of Record. Upon Appeal from the United States District

Court for the Western District of Washington,
Northern Division.

Filed December 11, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and BELLINGHAM BAY IM-
PROVEMENT COMPANY, a Corporation,
Appellants,

vs.

ALBERT R. McPHEE and FRANCES Mc-
PHEE,

Appellees.

**Statement of Errors on Which Appellants Will Rely
and Designation of Parts of the Record Neces-
sary for the Consideration Thereof.**

To the Clerk of the Above-entitled Court, to the Ap-
pellees Above Named, and to S. M. Bruce, Esq.,
Solicitor for Appellees:

Please take notice that the appellants in the
above-entitled cause intend to rely upon the follow-
ing errors committed by the United States District

Court for the Western District of Washington,
Northern Division:

ERROR No. I.

The District Court erred in overruling the separate motions of the appellants to dismiss the action upon the ground that the second amended bill of complaint failed to state facts sufficient to constitute a valid cause of action in equity.

ERROR No. II.

The District Court erred in making and entering its final decree, dated October 3d, 1922, adjudging that the appellants hold the legal title to the lands in controversy in trust for the appellees, and quieting the title of the appellees to said lands against the claims of the appellants and those claiming under them.

ERROR No. III.

The District Court erred in refusing to enter a decree quieting the title of the appellants to the lands respectively claimed and held by them against the claim of the appellees, as prayed in the appellants' cross-complaint.

ERROR No. IV.

The District Court erred in refusing to hold and decide upon the motions to dismiss that the only question presented by the second amended complaint was a question of fact as to whether or not any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the Railway Company, and that said question of fact had theretofore been submitted to and determined by the United States Land

Department and was therefore not within the jurisdiction or power of the District Court to re-examine or determine in this suit.

ERROR No. V.

The District Court erred in refusing to hold and decide upon the final hearing that the only question presented by the pleadings and proof was a question of fact as to whether any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the Railway Company, and that said question of fact had theretofore been submitted to and determined by the United States Land Department and was therefore not within the jurisdiction or power of the District Court to re-examine or determine in this suit.

ERROR No. VI.

The District Court erred in refusing to hold and decide upon the motion to dismiss that the second amended complaint totally failed to show that any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the St. Paul, Minneapolis & Manitoba Railway Company.

ERROR No. VII.

The District Court erred in refusing to hold and decide upon the final hearing that the evidence totally failed to show that any adverse right or claim to the land in controversy had attached or been initiated at the time of the selection of said land by the St. Paul, Minneapolis & Manitoba Railway Company.

ERROR No. VIII.

The District Court erred in refusing to hold and decide upon the motions to dismiss and upon all the evidence in the case, that upon the abandonment or disposal of the land in controversy by the claimants prior to the appellees, the pending, but unapproved, selection list of the St. Paul, Minneapolis & Manitoba Railway Company attached to said lands, and immediately segregated them from subsequent entry or claim by appellees or their predecessors, as public lands under the homestead laws.

ERROR No. IX.

The District Court erred in refusing to hold and decide that the adjudication of the United States Land Department against the claim of the appellees' predecessor Beebe, immediately prior to Beebe's relinquishment in favor of the appellees, permitted the pending, but unapproved, selection list of the Railway Company to attach to the lands in controversy, and precluded the initiation of any right or claim thereto as public lands by the appellees under the homestead laws.

ERROR No. X.

The District Court erred in holding and deciding upon all the evidence in the case that the appellees were in any event entitled to prevail as to any of the land in controversy other than the Southwest quarter of the Northwest quarter (SW. $\frac{1}{4}$ NW. $\frac{1}{4}$) of Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., since there is no evidence whatsoever showing, or tending to show, that any of the other land in controversy

was occupied or claimed by any person whomsoever at or prior to the time of the filing of the selection list by the railway company.

ERROR No. XI.

The District Court erred in refusing to hold and decide that in no event could the appellees prevail as to any of the land in controversy now lying in Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., except the portion thereof previously known and described as a part of Section Eleven (11), said township and range, and occupied or claimed under the homestead laws of the United States by some predecessor of the appellees at the time of the filing of the railway company's selection list.

For the consideration of said errors by the United States Circuit Court of Appeals for the Ninth Circuit, appellants think the following parts of the record necessary, to wit:

| Designation of Document. | Page No. of Original Certi- fied Record Where Docu- ment Appears. |
|---|---|
| 1. Second amended complaint, including Exhibits "A" and "B" attached thereto and by reference made a part thereof | 21 to 192 |
| 2. Separate motion of Great Northern Railway Company to dismiss..... | 193 |
| 3. Separate motion of Bellingham Bay Improvement Company to dismiss. | 194 |
| 4. Opinion of the District Court, filed July 19, 1921..... | 195 to 200 |

| Designation of Document. | Page No. of Original Certi- fied Record Where Docu- ment Appears. |
|--|---|
| 5. Opinion of District Court, filed No- | |
| vember 9, 1921..... | 201 to 202 |
| 6. Order overruling motions to dismiss | 203 |
| 7. Answer and cross-complaint..... | 204 to 210 |
| 8. Answer to cross-complaint..... | 211 |
| 9. Statement of evidence..... | 212 to 235 |
| 10. Decision filed September 7th, 1922.. | 236 |
| 11. Decree entered October 3d, 1922.... | 237 to 238 |
| 12. Petition for appeal and allowance | |
| thereof..... | 239 to 240 |
| 13. Assignment of errors..... | 241 to 244 |
| 14. Appeal and supersedeas bond..... | 245 to 246 |
| 15. Citation and proof of service..... | 247 |
| | Original transmitted |
| 16. Plaintiffs' Exhibit 1 | by Order of the |
| (Not to be printed) | District Court. |
| 17. Plaintiffs' Exhibit 2 | |
| (Not to be printed) | “ “ “ |
| 18. Defendants' Exhibit "A" | “ “ “ |
| 19. Defendants' Exhibit "B" | “ “ “ |
| 20. Defendants' Exhibit "C" | “ “ “ |
| 21. Defendants' Exhibit "D" | “ “ “ |
| 21. Defendants' Exhibit "E" | “ “ “ |
| 22. Defendants' Exhibit "F" | “ “ “ |
| 23. Defendants' Exhibit "G" | |
| (Not to be printed) | “ “ “ |
| 24. Defendants' Exhibit "H" | |
| (Not to be printed) | “ “ “ |

Dated this 7th day of December, 1922.

THOMAS BALMER,
Solicitor for Great Northern Railway Company.

CLINTON W. HOWARD,
Solicitor for Bellingham Bay Improvement Com-
pany.

The appellees acknowledge due and timely service of the within and foregoing statement of errors and designation of parts of the record necessary for the consideration thereof by the receipt of true copy thereof at Bellingham, Washington, this 11th day of December, 1922, and hereby stipulate that only those parts of the record designated in the foregoing statement shall be printed.

S. M. BRUCE,
Solicitor for Appellees.

[Endorsed]: No. 3952. In the United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, and Bellingham Bay Improvement Company, a Corporation, Appellants, vs. Albert R. McPhee and Frances McPhee, Appellees. Statement of Errors on Which Appellants Will Rely and Designation of Parts of the Record Necessary for the Consideration Thereof. Filed Dec. 15, 1922. F. D. Monckton, Clerk.

Defendants' Exhibit "A."

[Endorsed]: No. 3952. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 12, 1922. F. D. Monckton, Clerk.

"B"

J. E. P.

#13—E.

4—207.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C.

March 24th, 1922.

I hereby certify that the annexed copy of St. Paul, Minneapolis & Manitoba Railway Company Selection List No. 44, Seattle, is a true and literal exemplification from the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed by name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal]

D. K. PARROTT,

Acting Assistant Commissioner of the General Land Office.

1902-98153-
Original

01653

LAND DEPARTMENT

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

List No. 111 (01653)

STATE OF
U. S. LAND OFFICE at

Stellie
May 7

The ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY, under and by virtue of the Act of Congress, entitled, "An act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota," approved August 5th, 1892, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands, claimed by said Company as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said Act of Congress, and the location and construction of the line of route of the Railway of said Company, the selections being particularly described as follows, to-wit:

Sept 22, 1912. Geological survey of (part of) ...
3,510 ACES for same, as to S 1/4 Sec 17 T 14 N R 10 W
sent to location Oct 3/22 1912

Clay

972100-2

SELECTIONS

North of Base Line and East of
The Willamette Principal Meridian Seattle
Land District, State of Washington

IN LIEU OF

North of Base Line and West of Fifth Principal Meridian,
State of North Dakota.

| PARTS OF SECTION | SEC. | TOWN | RANGE | ACRES | PARTS OF SECTION | SEC. | TOWN | RANGE | ACRES |
|---|------|------|-------|-------|------------------|------|------|-------|-------|
| <p>That which when Surveyed will be</p> <p>The S¹/₂ of the NE¹/₄ 12 39 6 E¹/₃ 80</p> <p>(NW¹/₄ 4nd S¹/₂ and the N¹/₂ of the NW¹/₄ 3rd S¹/₂)</p> <p>1911-169976-Part of Seattle Rising</p> | | | | | | | | | |

That which when Surveyed will be

The S¹/₂ of the NE¹/₄ 12 39 6 E¹/₃ 80

(NW¹/₄ 4nd S¹/₂ and the N¹/₂ of the NW¹/₄ 3rd S¹/₂)

1911-169976-Part of Seattle Rising

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Sec. 12 39 6 E¹/₃ 80

12 39 6 E¹/₃ 80

12 39 6 E¹/₃ 80

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Cancelled by the State of North Dakota

13-29-6 E¹/₃ - 1000000

13-29-6 E¹/₃ - 1000000

13-29-6 E¹/₃ - 1000000



172100-3

250

July 31/02-132290

IN LIEU OF

44-1

North of Base Line and West of Fifth Principal Meridian,
State of North Dakota.

Land District, State of *Tacoma*

PARTS OF SECTION

| SEC. | TOWN | RANGE | ACRES |
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| 70 | 70 | 70 | 70 |
| 71 | 71 | 71 | 71 |
| 72 | 72 | 72 | 72 |
| 73 | 73 | 73 | 73 |
| 74 | 74 | 74 | 74 |
| 75 | 75 | 75 | 75 |
| 76 | 76 | 76 | 76 |
| 77 | 77 | 77 | 77 |
| 78 | 78 | 78 | 78 |
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| 90 | 90 | 90 | 90 |
| 91 | 91 | 91 | 91 |
| 92 | 92 | 92 | 92 |
| 93 | 93 | 93 | 93 |
| 94 | 94 | 94 | 94 |
| 95 | 95 | 95 | 95 |
| 96 | 96 | 96 | 96 |
| 97 | 97 | 97 | 97 |
| 98 | 98 | 98 | 98 |
| 99 | 99 | 99 | 99 |
| 100 | 100 | 100 | 100 |

PARTS OF SECTION

| SEC | TOWN | RANGE | ACRES |
|-----|------|-------|-------|
|-----|------|-------|-------|

Experimental Set 10 - 4

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SEⁿS₁+₂+ACⁿN₁" Sec 13 part of Station R. 1911-169976.

This list is a rearrangement of List No. 4 and is filed for the purpose of rearranging the lost or relinquished lands designated therein to conform to departmental regulations.

Wm. C. Binton
Selecting Agent
St. P. & N. W. Ry. Co.

June 21. 1907



972100—4

State of Minnesota,
County of Ramsey,—ss.

I, Thos. R. Benton, being duly sworn, depose and say that I am the land agent of The St. Paul, Minneapolis and Manitoba Railway Company, that the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said The St. Paul, Minneapolis and Manitoba Railway Company as enuring to it, under the Act of Congress, entitled “An Act for the relief of settlers upon certain lands in the states of North Dakota and South Dakota,” approved August 5th, 1892, that the said lands are vacant, unappropriated, and are not interdicted mineral nor reserved lands, and are of the character contemplated by the said Act.

THOS. R. BENTON,

Sworn and subscribed before me this 22d day of
March, 1902.

[Seal]

WALTER T. LEMON,

Notary Public, Ramsey County, Minnesota.

UNITED STATES LAND OFFICE,

Seattle, Washington.

May 9th, 1902.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the St. Paul, Minneapolis and Manitoba Railway Company, under the grant to the said Company, by Act of Congress approved August 5th, 1892, entitled “An Act for the relief of settlers upon

certain lands in the states of North Dakota and South Dakota," and selected by said The St. Paul, Minneapolis and Manitoba Railway Company by Thomas R. Benton, the duly authorized agent; and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we fully certify that the filing of said list is allowed and approved, and that the whole of said lands are unsurveyed public lands of the United States, and that the same are not, nor is any part thereof classified and returned as mineral land or lands, nor claimed as swamp lands, nor is there any homestead, pre-emption, State or other valid claim to any portion of said lands on file or of record in this office.

We further certify that the foregoing list shows that an assessment of the fees payable to us, allowed by the act of Congress approved July 1st, 1864, and contemplated by the circular of instructions dated November 7th, 1879, addressed by the Commissioner of the General Land Office to Registers and Receivers of the United States Land Offices, and that the said Company have paid to the undersigned, the Receiver, the full sum of Eight Dollars, in full payment and discharge of said fees.

EDWARD P. TREMPER,

Register.

Receiver.

Defendants' Exhibit "B."

[Endorsed]: No. 3952. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 12, 1922. F. D. Monekton, Clerk.

"B"

J. E. P.

#13—E.

4—207

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C.

March 24th, 1922.

I hereby certify that the annexed copy of St. Paul, Minneapolis & Manitoba Railway Company Selection List No. 44-A, Seattle, is a true and literal exemplification from the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal]

D. K. PARROTT,

Acting Assistant Commissioner of the General Land Office.

Original

01653

LAND DEPARTMENT

ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

LIST NO 445

61653
A supplemental to List no 444

STATE OF

Washington

U. S. LAND OFFICE at

Seattle

February 15 1907

The ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY, under and by virtue of the Act of Congress, entitled, "An Act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota," approved August 5th, 1892, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office hereby makes and files the following list of selections of public lands, claimed by said Company as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said Act of Congress, and the location and construction of the line of route of the Railway of said Company, the selections being particularly described as follows, to-wit:

Noted in North Dakota and Washington

April 27 1907

781



46—972100—7

State of Minnesota,
County of Ramsey,—ss.

I, Thos. R. Benton, being duly sworn, depose and say, that I am the land agent for the St. Paul, Minneapolis and Manitoba Railway Company, that the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said The St. Paul, Minneapolis and Manitoba Railway Company as enuring to it, under the act of Congress, entitled "An Act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota," approved August 5th, 1892, that the said lands are vacant, unappropriated, and are not interdicted mineral nor reserved lands, and are of the character contemplated by the said Act.

THOS. R. BENTON.

Sworn and subscribed before me this 18th day of February, 1907.

[Seal]

JAMES STODDART,

Notary Public, Ramsey County, Minnesota.

My commission expires June 21st, 1911.

UNITED STATES LAND OFFICE,
Seattle, Washington.

Feb'y 23d, 1907.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by The St. Paul, Minneapolis and Manitoba Railway Company, under the grant to the said Company, by Act of Congress approved August 5th,

1892, entitled "An Act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota," and selected by said The St. Paul, Minneapolis and Manitoba Railway Company by Thos. R. Benton, the duly authorized agent; and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor is any part thereof classified and returned as mineral land or lands, nor claimed as swamp lands, nor is there any prior homestead, pre-emption, State or other valid claim to any portion of said lands on file or of record in this office.

We further certify that the foregoing list shows that an assessment of the fees payable to us, allowed by the act of Congress approved July 1st, 1864, and contemplated by the circular of instructions dated November 7th, 1879, addressed by the Commissioner of the General Land Office to Registers and Receivers of the United States Land Offices, and that the said Company have paid to the undersigned, the Receiver, the full sum of (Fees paid May 9th 1902 List No. 44) Dollars, in full payment and discharge of said fees.

J. HENRY SMITH,
Register.

FRANK A. TWICHELL,
Receiver.

Defendants' Exhibit "C."

[Endorsed]: No. 3952. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 12, 1922. F. D. Monckton, Clerk.

"B"

J. E. P.

#13—E

4—207

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C.

March 24th, 1922.

I hereby certify that the annexed extract copy of Clear List No. 43, Great Northern Railway Company, successor to St. Paul M. & M. Railway Co., so far as it relates to the lands therein shown, is a true and literal exemplification from the said list on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal]

D. K. PARROTT,

Acting Assistant Commissioner of the General Land Office.

Clear List #43
Washington

Great Northern Railway Company
Summed to

St Paul M & M Ry Co

Act of Aug. 5, 1892
27 Stat, 390

Seattle Land District

ha 15
x # 39

4-19-19 to James F. Maher, Land Commr, Great Northern
Ry Company, St Paul Minn for \$524.72 Survey fees ^{Jan}

5-5-19 Survey fees paid \$524.72 See 845825 & Confirmation
by Dir. "M" ~~845825~~ and Duplicate Certificate of Deposit # 340
transmitted by letter 847954 J.H.D.

7-31-19 to James F. Maher Land Commr St Paul Minn.
for \$3²⁴ ~~Conveyance fees~~ ^{J.H.D.}

8-4-19 to R & R Seattle transmuting land of bonds
patented. ~~8912~~

PATENT No. 700321
July 24, 1913

B' LIST 589

11/11/19 Posted in H.D. P.O. & C.

972100-b

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.

March 29, 1919.

WHEREAS, under rulings of the General Land Office the extension into Dakota Territory, now the States of North Dakota and South Dakota, of the limits of the grants of land made by Congress to aid in the construction of the several lines of railroad owned by the St. Paul, Minneapolis and Manitoba Railway Company was denied and in consequence of such rulings, lands within the limits of said grants in said States have been claimed, settled upon, occupied and improved by numerous persons in good faith under color of title or of right to do so, derived from the various laws of the United States relating to the public domain and are now claimed by them, their heirs or assigns; and

WHEREAS, under subsequent construction of said grants, the said occupants, improvers or purchasers were liable to be evicted from their holdings; and

WHEREAS, by Act of Congress approved August 5, 1892 (27 Stat. 390), the Secretary of the Interior was directed to cause to be prepared and delivered to said railway company a list of the tracts which have been purchased, claimed and occupied and improved as set forth therein and provided that after the receipt of said list the railway company should execute under its corporate seal and deliver to the Secretary of the Interior a deed of

conveyance releasing said lands to the United States and should procure, and cause to be released to the United States all claims and liens thereon derived through it; and

WHEREAS, said company upon the execution and procurement of the release aforesaid was authorized to select "an equal quantity of nonmineral public lands, so classified as nonmineral at the time of the actual Government survey which has been or shall be made, of the United States, not reserved and to which no adverse right or claim shall have attached

Patent No. 700321

July 24, 1919.

'B' List 589

972100-c

or have been initiated at the time of the making of such selection lying within any State into or through which the railway owned by said railway company runs," in lieu of the released tracts which shall not include any lands within the limits of the grant to aid in the construction of the St. Vincent Branch of the road as located under the Act of March 3, 1871, upon which any person had, in good faith, settled and made or acquired valuable improvements prior to March, eighteen hundred and seventy-seven; and

WHEREAS, there has been filed in and accepted by the Department of the Interior, evidence showing that the Great Northern Railway Company is the lawful successor in interest of the St. Paul, Minneapolis and Manitoba Railway Company and entitled to receive patent for all lands earned by

the latter company, the ultimate title to which remains in the United States; and

WHEREAS, the following described lands have been selected by the duly authorized agent of the company, under the Act of August 5, 1892, and the lands given as the basis therefor have been duly released and conveyed to the United States in conformity with the requirements of said act,

Patent No. 700321

July 24, 1919.

North of base line and East of Willamette Meridian.

WASHINGTON.

GREAT NORTHERN RAILWAY LIST.

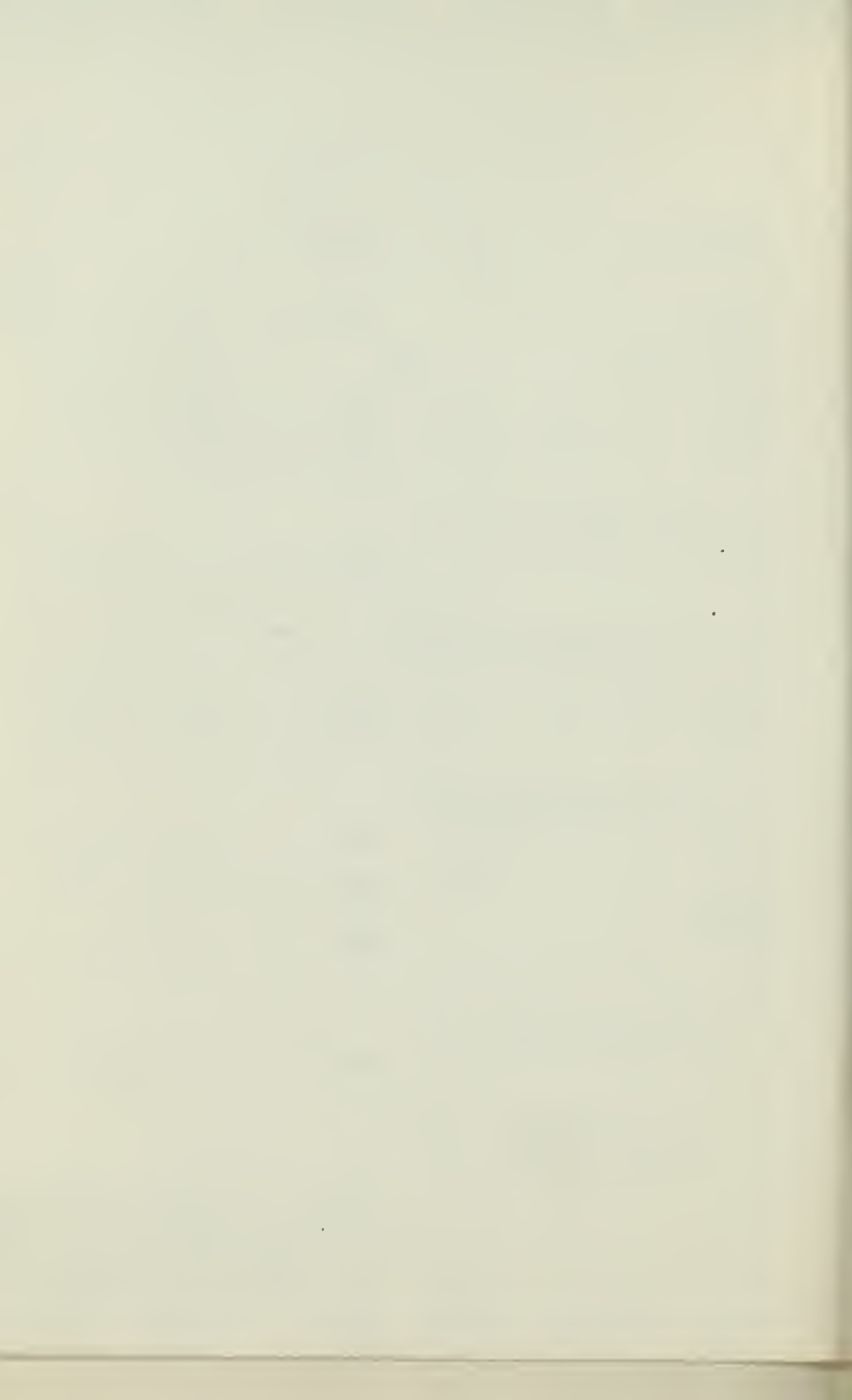
Indemnity

Act August 5, 1892
(27 Stat.390).

| Parts of Section. | Sec. | T. | R. | Acres | | Parts of Section. | Sec. | T. | R. | Acres |
|--|------|----|----|-------|-------------------------------------|----------------------|------|----|-------------|-------|
| <u>Seattle</u> | | N. | E. | | | <u>North Dakota</u> | | N. | W. 5th P.M. | |
| <u>List 48 & 48 D (01756) June 3, 1902.</u> <u>and June 30, 1913.</u> | | | | | In lieu of | | | | | |
| Lot 4 | 21 | 36 | 5 | 39.70 | NE $\frac{1}{4}$ SE $\frac{1}{4}$ | 35 | 150 | 50 | 40.00 | |
| Lot 5 | 21 | 36 | 5 | 39.50 | " SE $\frac{1}{4}$ SE $\frac{1}{4}$ | 35 | 150 | 50 | 40.00 | |
| Lot 12 | 21 | 36 | 5 | 39.25 | " NW $\frac{1}{4}$ SE $\frac{1}{4}$ | 35 | 150 | 50 | 40.00 | |
| Lot 13 | 21 | 36 | 5 | 38.90 | " SW $\frac{1}{4}$ SE $\frac{1}{4}$ | 35 | 150 | 50 | 40.00 | |
| <u>List 46 & 46 A (0262) May 19, 1902</u> <u>and February 18, 1917.</u> | | | | | | | | | | |
| Lot 3 NE $\frac{1}{4}$ SW $\frac{1}{4}$ | 24 | 39 | 5 | 81.97 | " E $\frac{1}{2}$ SE $\frac{1}{4}$ | 19 | 130 | 47 | 80.00 | |
| <u>List 47 & 47 A (0263) May 26, 1902</u> <u>and February 23, 1907.</u> | | | | | | | | | | |
| Lot 4 SE $\frac{1}{4}$ SW $\frac{1}{4}$ | 24 | 39 | 5 | 82.66 | " S $\frac{1}{2}$ SE $\frac{1}{4}$ | 1 | 130 | 48 | 80.00 | |
| <u>List 58 & 58 C (02993) August 9, 1902</u> <u>and November 2, 1916.</u> | | | | | | | | | | |
| Lot 6 | 23 | 37 | 6 | 38.72 | " SW $\frac{1}{4}$ NW $\frac{1}{4}$ | 3 | 130 | 47 | 40.00 | |
| Lot 4 | 26 | 37 | 6 | 38.85 | " NW $\frac{1}{4}$ NW $\frac{1}{4}$ | 13 | 130 | 48 | 40.00 | |
| Lot 5 | 26 | 37 | 6 | 38.72 | " SW $\frac{1}{4}$ NE $\frac{1}{4}$ | 13 | 130 | 48 | 40.00 | |
| <u>List 49 & 49 B (01639) June 14, 1902</u> <u>and February 23, 1912.</u> | | | | | | | | | | |
| SW $\frac{1}{4}$ NE $\frac{1}{4}$ | 2 | 38 | 6 | 40.00 | " NE $\frac{1}{4}$ NW $\frac{1}{4}$ | 3 | 130 | 48 | 39.74 | |

PATENT NO 700321
July 24 1918

| Parts of Section. | Sec. | T. | R. | Acres | | Parts of Section. | Sec. | T. | R. | Acres |
|--|------|----|----|--------|------------------|--|------|-------|----------|--------|
| Seattle | | N. | E. | | | North Dakota | | N. W. | 5th P.M. | |
| List 49 Cont'd. | | | | | In lieu of | | | | | |
| S $\frac{1}{2}$ NW $\frac{1}{2}$ | 2. | 38 | 6 | 80.00 | | S $\frac{1}{2}$ NE $\frac{1}{2}$ | 3 | 130 | 48 | 80.00 |
| SE $\frac{1}{2}$ SW $\frac{1}{2}$ | 3. | 38 | 6 | 40.00 | " | NW $\frac{1}{2}$ NE $\frac{1}{2}$ | 3 | 130 | 48 | 39.70 |
| SW $\frac{1}{2}$ SW $\frac{1}{2}$ | 11 | 38 | 6 | 40.00 | " | NE $\frac{1}{2}$ SE $\frac{1}{2}$ | 5 | 130 | 48 | 40.00 |
| List 48 & 48 B (01756) June 3, 1902 and February 23, 1912. | | | | | | | | | | |
| SE $\frac{1}{2}$ NW $\frac{1}{2}$ | 17 | 38 | 6 | 40.00 | " | NE $\frac{1}{2}$ NE $\frac{1}{2}$ | 17 | 147 | 49 | 40.00 |
| List 49 & 49 A (01639) June 14, 1902 and February 23, 1907. | | | | | | | | | | |
| NW $\frac{1}{2}$ SW $\frac{1}{2}$ | 28 | 38 | 6 | 40.00 | " | NE $\frac{1}{2}$ SW $\frac{1}{2}$ | 5 | 130 | 48 | 40.00 |
| E $\frac{1}{2}$ SE $\frac{1}{2}$ | 11. | 39 | 6 | 80.00 | " | W $\frac{1}{2}$ SW $\frac{1}{2}$ | 5. | 130 | 48 | 80.00 |
| List 44 & 44 A (01653) May 9, 1902 and February 23, 1907. | | | | | | | | | | |
| S $\frac{1}{2}$ NE $\frac{1}{2}$ | 12 | 39 | 6 | 80.00 | " | E $\frac{1}{2}$ NE $\frac{1}{2}$ | 29 | 130 | 47 | 80.00 |
| W $\frac{1}{2}$ NW $\frac{1}{2}$ | 12 | 39 | 6 | 80.00 | " | W $\frac{1}{2}$ SE $\frac{1}{2}$ | 29 | 130 | 47 | 80.00 |
| NW $\frac{1}{2}$ SW $\frac{1}{2}$, SW $\frac{1}{2}$ SW $\frac{1}{2}$, SE $\frac{1}{2}$ | 12 | 39 | 6 | 240.00 | " | NW $\frac{1}{2}$, W $\frac{1}{2}$ SW $\frac{1}{2}$ | 29 | 130 | 47 | 240.00 |
| List 44 & 44 B (02446) May 9, 1902 and October 1, 1912. | | | | | | | | | | |
| NW $\frac{1}{2}$ NW $\frac{1}{2}$ | 13 | 39 | 6 | 40.00 | " | NW $\frac{1}{2}$ NE $\frac{1}{2}$ | 29 | 130 | 47 | 40.00 |
| List 67 & 67 B (0200) June 11, 1904 and January 14, 1913. | | | | | | | | | | |
| Lot 3 | 2 | 31 | 7 | 43.19 | " | NE $\frac{1}{2}$ SW $\frac{1}{2}$ | 5 | 131 | 47 | 40.00 |
| Lot 4 | 2 | 31 | 7 | 42.62 | " | NW $\frac{1}{2}$ SW $\frac{1}{2}$ | 5 | 131 | 47 | 40.00 |
| S $\frac{1}{2}$ NW $\frac{1}{2}$ | 2 | 31 | 7 | 80.00 | " | S $\frac{1}{2}$ SW $\frac{1}{2}$ | 5 | 131 | 47 | 80.00 |
| SW $\frac{1}{2}$ | 2 | 31 | 7 | 160.00 | " | NE $\frac{1}{2}$ | 33 | 149 | 49 | 160.00 |
| Lot 1 | 3 | 31 | 7 | 42.04 | " | SE $\frac{1}{2}$ NE $\frac{1}{2}$ | 1 | 149 | 50 | 40.00 |
| SE $\frac{1}{2}$ NE $\frac{1}{2}$ | 3 | 31 | 7 | 40.00 | " | SW $\frac{1}{2}$ NE $\frac{1}{2}$ | 1 | 149 | 50 | 40.00 |
| E $\frac{1}{2}$ SE | 3 | 31 | 7 | 80.00 | " | W $\frac{1}{2}$ SW | 17 | 149 | 49 | 80.00 |



972100-f

LAND GRANTS DIVISION.

March 29, 1919.

IT IS HEREBY CERTIFIED that the foregoing list has been examined in connection with the plats and records of this office and the selected tracts therein described are vacant and unappropriated in interest to St. Paul, Minneapolis and patent to the Great Northern Railway Company, successor in interest to St. Paul, Minneapolis and Manitoba Railway Company, under the Act of August 5, 1892 (27 Stat. 390), and the tracts specified as bases for the tracts selected have been duly released by the proper parties in interest, in accordance with the provisions of the aforesaid Act and the releases accepted by the Department and the said tracts have not heretofore been used as bases for any approved selections.

45,063.84

It is further certified that (42,143.60) of the 65,000 acres, which under the act can be selected, have heretofore been patented to the Company, none of which has subsequently been reconveyed to the United States Government, leaving a balance of 19,936.16

(22,856.40) acres subject to selection under the provisions of the aforesaid act.

Certification is further made that said selected tracts were not returned as mineral, and have been reported on by the Geological Survey and Special Agents of this office as containing no valuable de-

posits of coal or other minerals and as having no power-site or reservoir possibilities.

JNO. H. DORRIS,
Examiner.

Approved:

G. B. DRIESBOCK,
Chief of Division.

Patent No. 700321

972100-g

July 24, 1919

W. B. C.

NOW, THEREFORE, as it has been found upon a careful examination of the foregoing list of selections in connection with the records of the General Land Office, that the said selections, in so far as said records show, are free from conflict and the tracts given as bases therefor have been duly released and conveyed to the United States by the St. Paul, Minneapolis and Manitoba Railway Company and the releases accepted by the Secretary of the Interior, it is hereby recommended that the selected tracts, covering two thousand, seven hundred and sixty acres and twenty-four hundredths of an acre, be approved and carried into patent as lands inuring to the Great Northern Railway Company, under the Act of August 5, 1892 (27 Stat. 390), successors in interest to the St. Paul, Minneapolis and Manitoba Railway Company as aforesaid, the patent to contain a reservation in accordance with the proviso to the Act of August 30, 1890 (26 Stat. 391).

Commissioner.

To the Honorable

Secretary of the Interior.

DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C.

May 27, 1919.

Approved: embracing two thousand, seven hundred and sixty acres and twenty-four hundredths of an acre.

ALEXANDER T. VOGELSANG,

First Assistant Secretary of the Interior.

JWW

GWM

Patent No. 700321

July 24, 1919

'B' List 589

HSH

Defendants' Exhibit "D."

[Endorsed]: No. 3952. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 12, 1922. F. D. Monckton, Clerk.

#13—E

No. 224525.

UNITED STATES

To

GREAT NORTHERN RAILWAY COMPANY.

PATENT.

Patent No. 39.

Great Northern Railway Company.

Successor to the

St. Paul, Minneapolis and Manitoba Railway Company.

Act August 5, 1892.

No. 700321.

Seattle Land District, Washington.

4—1043.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents Shall Come,
GREETING:

WHEREAS under the rulings of the General Land Office the extension into Dakota Territory, now the States of North Dakota and South Dakota, of the limits of the grants of lands made by Congress to aid in the construction of the several lines of railroad owned by the St. Paul, Minneapolis and Manitoba Railway Company, was denied and in consequence of such rulings, lands within the limits of said grants in said States have been claimed, settled upon, occupied and improved by numerous persons in good faith under color of title or of right to do so, derived from the various laws of the United States relating to the public domain and are now claimed by them, their heirs or assigns; and,

WHEREAS, under subsequent construction of said grants, the said occupants, improvers or purchasers were liable to be evicted from their holdings; and

WHEREAS, by Act of Congress approved August 5, 1892 (27 Stat. 390), the Secretary of the Interior was directed to cause to be prepared and delivered to said railway company a list of the tracts which had been purchased, claimed and occupied and improved as set forth therein and provided that after the receipt of said list the railway company should execute under its corporate

seal and deliver to the Secretary of the Interior a deed of conveyance, releasing said lands to the United States, and should procure, and cause to be released to the United States all claims and liens thereon derived through it; and

WHEREAS, said company upon the execution and procurement of the release aforesaid was authorized to select "an equal quantity of nonmineral public lands, so classified as nonmineral at the time of the actual Government survey which has been or shall be made, of the United State-, not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any State into which the railway owned by said railway company runs," in lieu of the released tracts which shall not include any lands within the limits of the grant to aid in the construction of the St. Vincent Branch of the road as located under the Act of March 3, 1871, upon which any person had in good faith, settled and made or acquired valuable improvements prior to March, eighteen hundred and seventy-seven; and

WHEREAS, there has been filed in and accepted by the Department of the Interior, evidence showing that the Great Northern Railway Company, is the lawful successor in interest of the St. Paul, Minneapolis and Manitoba Railway Company and entitled to receive patent for all lands earned by the latter company, the ultimate title to which remains in the United States; and

WHEREAS, the following described lands have

been selected by the duly authorized agent of the company, under the Act of August 5, 1892, and the lands given as the bases therefor have been duly released and conveyed to the United States in conformity with the requirements of said Act, viz.:

WILLAMETTE MERIDIAN, WASHINGTON.

Township thirty-six, north of Range five east; the Lots four, five, twelve and thirteen of Section twenty-one; Township thirty-nine north of Range five east; the Lots three and four, the northeast quarter of the southwest quarter and the southeast quarter of the southwest quarter of section twenty-four.

Township thirty-seven north of Range six east.

The Lot six of Section twenty-three and the Lots four and five of Section twenty-six.

Township thirty-eight north of Range six east; the southwest quarter of the northeast quarter and the south half of the northwest quarter of section two, the southeast quarter of the southwest quarter of section three, the southwest quarter of the southwest quarter of Section eleven, the southeast quarter of the northwest quarter of Section seventeen and the northwest quarter of the southwest quarter of section twenty-eight.

Township thirty-nine north of Range six east.

The east half of the southeast quarter of Section eleven, the south half of the northeast quarter, the west half of the northwest quarter and the northwest quarter of the southwest quarter, the southwest quarter, of the southwest quarter and the

southeast quarter of section twelve and the northwest quarter of the northwest quarter of section thirteen.

Township thirty-one north of Range seven east.

The lots three and four, the south half of the northwest quarter and the southwest quarter of Section two and the Lot one, the southeast quarter of the northeast quarter and the east half of the southeast quarter of Section three.

Township thirty-two north of Range seven east.

The Lot six and the northwest quarter of the southwest quarter of Section twenty-two, the southwest quarter of the northwest quarter of Section twenty-seven and the northeast quarter of the northeast quarter of Section twenty-eight.

Township thirty-five north of Range seven east.

The southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of Section twenty-five.

Township twenty-seven north of Range eight east.

The Lot eight of Section one.

Township thirty-three north of Range nine east.

The west half of the northeast quarter and the Lots one and two of Section twenty-four.

Township thirty-two north of Range ten east.

The Lot five of Section eight, the north half of the northeast quarter, the south half of the southeast quarter, the Lot one, the south half of the northeast quarter and the southeast quarter of the northwest quarter of Section nine and the Lots

five, six, seven, ten, eleven and twelve of Section seventeen.

Containing in the aggregate, two thousand seven hundred sixty and twenty-four hundredths acres.

NOW KNOW YE, that the United States of America, in consideration of the premises, and pursuant to the said Act of Congress, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT unto the Great Northern Railway Company successor in interest to the St. Paul, Minneapolis and Manitoba Railway Company, and to its assigns, the tracts of land selected as aforesaid and described in the foregoing; TO HAVE AND TO HOLD the said tracts with the appurtenances thereof, unto the Great Northern Railway Company, successor as aforesaid, and to its successors and assigns, forever. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, WOODROW WILSON, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-fourth day of July, in the year of our Lord one thousand nine hundred and nineteen,

and of the Independence of the United States, the one hundred and forty-fourth.

By the President: WOODROW WILSON,
By E. D. BOULDIN,
Assistant Secretary.
L. Q. C. LAMAR,
Recorder of the General Land Office.

[United States General Land Office.]

Recorded: Patent Number 700321.

Patent No. 39, July 24, 1919.

WHATCOM COUNTY.

| Description. | Section. | Township. | Range. | Acres. |
|---|----------|-----------|--------|--------|
| Lot 3 | 24 | 39 | 5 | 41.97 |
| " 4 | " | " | " | 42.66 |
| NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ | " | " | " | 40. |
| SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ | " | " | " | 40. |
| Lot 6 | 23 | 37 | 6 | 38.72 |
| Lots 4, 5 | 26 | " | " | 77.57 |
| SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ S. $\frac{1}{2}$ NW. $\frac{1}{4}$ | 2 | 38 | 6 | 120. |
| SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ | 3 | " | " | 40. |
| SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ | 11 | " | " | 40. |
| SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ | 17 | " | " | 40. |
| NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ | 28 | " | " | 40. |
| E. $\frac{1}{2}$ SE. $\frac{1}{4}$ | 11 | 39 | 6 | 80. |
| S. $\frac{1}{2}$ NE. $\frac{1}{4}$ W. $\frac{1}{2}$ NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ | | | | |
| SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ | 12 | " | " | 400. |
| NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ | 13 | " | " | 40. |

Patent No. 39, July 24, 1919.

SKAGIT COUNTY.

| Description. | Section. | Township. | Range. | Acres. |
|---|----------|-----------|--------|--------|
| Lot 4 | 21 | 36 | 5 | 39.70 |
| " 5 | " | " | " | 39.50 |
| " 12 | " | " | " | 39.25 |
| " 13 | " | " | " | 38.90 |
| SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ | 25 | 35 | 7 | 80. |
| W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Lots 1 and 2 | 24 | 33 | 9 | 187.93 |

425.28

Received for Record at 8:30 A. M., Dec. 15, A. D. 1919, and recorded at request of James T. Maher.

J. A. MILLER,

County Auditor, Whatcom Co., Wn.

Recorded Vol. 3 Patents, page 536.

State of Washington,

County of Whatcom,—ss.

I, Sam E. Barrett, County Auditor and ex-officio Recorder of Deeds in and for Whatcom County, State of Washington, hereby certify that the annexed and foregoing is a true and correct copy of Patent from United States to Great Northern Railway Company, #224525, as the same appears of record, on page 536 of Volume 3 of Patent Records of said County.

WITNESS my hand and official seal this 5 day of April, A. D. 1922.

[Seal]

SAM E. BARRETT,

County Auditor in and for Whatcom County, State of Washington.

By L. E. King,

Deputy.

No. 224525. Certified Copy of Patent—United States to Gr. Northern Ry. Co. Prepared at the request of Gt. Northern Ry. Co. Received for Record at 8:30 A. M. Dec. 15, A. D. 1919, and recorded at request of James T. Maher. J. A. Miller, County Auditor Whatcom Co., Wn. Sam E. Barrett, Auditor of Whatcom County, Washington.

\$2.40.

Defendants' Exhibit "E."

#13—E.

4—699.

DEPARTMENT OF THE INTERIOR.
OFFICE OF U. S. SURVEYOR GENERAL.

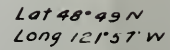
Olympia, Washington, April 3, 1922.

I, Clair Hunt, U. S. Surveyor General for Washington, do hereby certify that the annexed blueprint of the plat of the survey of Township 39 North, Range 6 East of the Willamette Meridian, is a true and literal exemplification of said plat now on file in this office.

[Seal]

CLAIR HUNT,
United States Surveyor General for Washington.





The above map of T 39 N., R 6 E., WM was approved by the Surveyor General for Washington Sept. 29, 1906 and was accepted by Commissioner's letter "E", dated Nov. 27, 1906.



Defendants' Exhibit "F."

[Endorsed]: No. 3952. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 12, 1922. F. D. Monckton, Clerk.

#13—E.

(1)

Certified Copy.

FIELD-NOTES OF THE SURVEY OF SEC. 12,
Tp. 39 N., R. 6 E.

(East line of section 12.)

Begin at the cor. of secs. 7, 12, 13 and 18, which is a sandstone, 24x18x10 ins. 18 ins. in the ground, for cor. of secs. 7, 12, 13 and 18, marked with 4 notches on S. and 2 on N. edges, from which brs,

A hemlock 12 ins. dia. N. 47° E. 51 lks. dist.
mkd. T. 39 N. R. 7 E. S. 7 B. T.

A hemlock 10 ins. dia. S. 48½° E. 31 lks. dist.

mkd. T. 39 N. R. 7 E. S. 18 B. T.

A hemlock 12 ins. dia. S. 61° W. 4 lks. Dist.
mkd. T. 39 N. 6 E. S. 13 B. T.

A hemlock 12 ins. dia. N. 13½° W. 58 lks. dist.

mkd. T. 39 N. R. 6 E. S. 12 B. T.

(Thence I run.)

North bet. secs. 7 and 12.

Through heavy timber and dense undergrowth.

Descend N. slope over rolling ground.

21.50 Pony trail, brs, NE. & SW.

32.19 Old $\frac{1}{4}$ sec. cor. bears E. 12.50 chs. dist. I
destroy old cor. and marks on bearing
trees.

39.86 A fir 40 ins. dia. on line, I mark with 2
notches on N. and S. sides.

40.00 Set a hemlock post, 3 ft. long, 4 ins. sq.,
24 ins. in the ground, for $\frac{1}{4}$ sec. cor.
marked $\frac{1}{4}$ S. 12 on W. and 7 on E. face,
from which brs,

A hemlock, 5 ins. dia. S. $82\frac{1}{2}^{\circ}$ E. 19 lks.
dist.

mkd. $\frac{1}{4}$ S. 7 B. T.

A hemlock 5 ins. dia. N. 80° W. $161\frac{1}{2}$ lks.
dist.

mkd. $\frac{1}{4}$ S. 12 B. T.

41.00 Stream 3 lks. wide, course N. 60° E. and
foot of descent 650 ft. below cor. Thence
over rolling bench through old burn.

49.00. Begin descent, brs. E. & W.

56.50 Begin descent on steep slope, bears NW. &
SE.

57.68 A fir 26 ins. dia. on line, I mark with 2
notches on N. and S. sides.

'61.89 A fir 36 ins. dia. on line, I mark with 2
notches on N. and S. sides.

(2)

Section 12, Tp. 39 N., R. 6 E., W. M.

62.00 At this point a creek 30 lks. wide, 50 lks.
E. of line, flows N. 10° E. from S. 30° E.

63.00 Foot of descent, bears E. & W., 200 ft. below top.

Thence over level bottom.

66.17 To right bank of creek, 25 lks. wide, course E., from S. 80° W. join first creek 30 lks. E. of line.

Leave burn.

66.43 To left bank of creek.

69.93 To left bank of creek, 50 lks wide, course N. 30° W.

70.50 To right bank of creek.

71.56 Old sec. cor. bears E. 13.90 chs. dist. I destroy cor. and marks on bearing trees.

71.85 To right bank of same creek, course N. 20° E., and S. 20° W.

72.50 To left bank of same creek, course N. 20° E.

74.30 To left bank of same creek, course N. 20° W. from S. 20° E.

76.00 To right bank of same creek, course N. 20° E. from S. 20° E. and leave bank.

77.00 To left bank of same creek, course N. 20° E. from S. 20° W.

77.50 Trail, bears NE. & SW.

80.00 Set a granite stone 20x12x8 ins. 15 ins. in the ground, for cor. to secs. 1, 6, 7 and 12, marked with 5 notches on S. and 1 on N. edges, from which bears,

A hemlock 9 ins. dia. N. $49\frac{1}{2}^{\circ}$ E. 62 lks. dist. mkd. T. 39 N. R. 7 E. S. 6 B. T.

An alder 12 ins. dia. S. $19\frac{1}{2}^{\circ}$ E. 26 lks. dist. mkd. T. 39 N. R. 7 E. S. 7 B. T.

An alder 12 ins. dia. S. $32\frac{1}{2}^{\circ}$ W. 18 lks. dist.
mkd. T. 39 N. R. 6 E. S. 12 B. T.

An alder 5 ins. dia. N. 35° W. 25 lks. dist.
mkd. T. 39 N. R. 6 E. S. 1 B. T.

Land rolling.

Soil, gravelly loam, 3d and 4th rate.

Timber, hemlock, fir, cedar, white fir, alder,
maple and cottonwood. Undergrowth, the
same with huckleberry, salmonberry, devil
club and vine maple.

Heavily timbered land and land covered
with dense undergrowth, 80.00 chs. July
28, 1905.

(3)

Section 12, Tp. 39 N. R. 6 E., W. M.

(South line of Sec. 12).

From the cor. to secs. 7, 12, 13 and 18,
on the east bdy. of the Tp.

Thence I run.

S. $89^{\circ} 59'$ W. on a true line bet. secs. 12
and 13.

Through heavy timber and dense under-
growth.

Along N. slope.

- 1.45 A cedar 40 ins. dia. on line, I mark with 2
notches on E. and W. sides.
- 2.00 Enter old burn, bears NE. & SW.
- 22.00 Begin steep descent, brs, NE. & SW.
- 27.92 Old $\frac{1}{4}$ sec. cor., bears S. 6.65 chs. dist.
I destroy cor. and marks on bearing trees.

- 30.00 Stream 4 lks. wide, course N. 50° W., foot of descent, 150 ft. below top, and leave burn, brs. NW. & SE.
- 31.75 Stream 10 lks. wide, course N. 60° W.
Thence over rolling ground.
- 40.05 Set a sandstone, 16x10x6 ins. 12 ins. in the ground, for $\frac{1}{4}$ sec. cor., marked $\frac{1}{4}$ on N. face, from which bears,
A hemlock 30 ins. dia. N. $53\frac{1}{2}^{\circ}$ E. 60 lks. dist.
mkd. $\frac{1}{4}$ S. 12 B. T.
A cedar 12 ins. dia. S. $19\frac{1}{2}^{\circ}$ W. 39 lks. dist.
mkd. $\frac{1}{4}$ S. 13 B. T.
- 43.42 Begin steep descent brs. NE. & SW.
- 44.86 To right bank of creek, 20 lks wide, course N. and foot of descent 100 ft. below top.
- 45.07 To left bank of creek, and begin steep ascent, brs. E. & W.
- 45.90 Top of steep ascent, 60 ft. above creek, and begin descent, bears NE. & SW.
- 51.00 To right bank of creek, 30 lks. wide, course N. 75° E. and foot of descent, 60 ft. below top.
- 51.78 To left bank of creek, and begin steep ascent, bears NE. & SW.
- 66.80 Old sec. cor., bears S. 6. 30 chs. dist., I destroy cor. and marks on bearing trees.
- 69.00 Summit of steep ascent, bears NE. & SW.
500 ft. above foot, and begin gradual ascent, bears NE. & SW.

(4)

Section 12, Tp. 39 N., R. 6 E., W. M.

80.10 Set a fir post, 3 ft. long, 5 ins. sq., 24 ins. in the ground, for cor. to secs. 11, 12, 13 and 14, marked.

T. 39 N. S. 12 on NE.,

R. 6 E. S. 13 on SE.,

S. 14 on SW. and

S. 11 on NW. faces, with 4 notches on S. and 1 on E. edges, from which bears,

A hemlock, 10 ins. dia. N. $15\frac{1}{2}^{\circ}$ E. 46 lks. dist.

mkd. T. 39 N. R. 6 E. S. 12 B. T.

A hemlock 10 ins. dia. S. 55° E. 35 lks. dist.

mkd. T. 39 N. R. 6 E. S. 13 B. T.

A fir balsam 12 ins. dia. S. 43° W. 44 lks. dist.

mkd. T. 39 N. R. 6 E. S. 14 B. T.

A hemlock 10 ins. dia. N. 46° W. 18 lks. dist.

mkd. T. 39 N. R. 6 E. S. 11 B. T.

Land rough and rolling.

Soil, gravelly loam, 3d and 4th rate.

Timber hemlock, fir, cedar, larch, fir, balsam and white fir.

Undergrowth, the same with huckleberry, salmonberry, devil club and vine maple.

Heavily timbered land and land covered with dense undergrowth, 80.10 chs.

(West line of Section 12.)

From the cor. of secs. 11, 12, 13 and 14 (cor. above) N. $0^{\circ} 01'$ W. bet. secs. 11 and 12.

Through heavy timber and dense undergrowth.

Ascend over rolling ground, bears NE. & SW.

17.00 Summit of ridge, bears E. & W., 150 ft. above cor.

18.00 Begin descent, bears E. & W.

27.00 Begin descent, brs. NW. & SE., 100 ft. below top of ridge.

32.94 Old $\frac{1}{4}$ sec. cor., bears E. 13.51 chs. dist.
I destroy cor. and marks on bearing trees.

34.00 Enter old burn, brs. NW. and SE.

40.00 Set a cedar post, 3 ft. long, 5 ins. sq. 24 ins. in the ground, for $\frac{1}{4}$ sec. cor. marked $\frac{1}{4}$ S. 11 on W. and 12 on E. faces, from which bears,

(5)

Section 12, Tp. 39 N., R. 6 E., W. M.

A hemlock 12 ins. dia. S. 81° E. 32 lks. dist.
mkd. $\frac{1}{4}$ S. 12 B. T.

A hemlock 24 ins. dia. N. 53° W. 52 lks. dist.

mkd. $\frac{1}{4}$ S. 11 B. T.

44.60 Stream 2 lks. wide, course NE.

65.45 Stream 15 lks. wide, course E. and foot of descent 950 ft. below top.

65.70 Begin ascent, bears E. & W.

67.50 Summit of ascent, bears E. & W., 70 ft. above stream, and begin gradual descent, bears NW. & SE.

72.20 Old sec. cor., bears E. 13.95 chs. dist., I destroy cor. and marks on bearing trees.

73.19 A fir 36 ins. dia. on line. I mark with 2 notches on N. & S. sides.

80.00 Set a cedar post, $3\frac{1}{2}$ ft. long, 5 ins. sq. 30 ins. in the ground, for cor. to secs. 1, 2, 11 and 12, marked,
 T. 39 N. S. 1 on NE.
 R. 6 E. S. 12 on SE.
 S. 11 on SW. and
 S. 2 on NW. faces, with 5 notches on S. and 1 on E. edges, from which bears,
 A hemlock, 10 ins. dia. N. $80\frac{1}{2}^{\circ}$ E. 41 lks. dist.

mkd. T. 39 N. R. 6 E. S. 1 B. T.
 A cedar 18 ins. dia. S. $91\frac{1}{2}^{\circ}$ E. 44 lks. dist.
 mkd. T. 39 N. R. 6 E. S. 12 B. T.
 A hemlock 14 ins. dia. S. 32° W. 20 lks. dist.

mkd. T. 39 N. R. 6 E. S. 11 B. T.
 A hemlock 16 ins. dia. N. 47° W. 34 lks. dist.

mkd. T. 39 N. R. 6 E. S. 2 B. T.
 This cor. is 120 ft. below top of descent.
 Land rolling. Soil, gravelly, loam, 2d and 3d rate.
 Timber, hemlock, fir, cedar, larch, and fir balsam,
 Undergrowth, the same with huckleberry, salmonberry, and devil club. Heavily timbered land and land covered with dense undergrowth, 80.00 chs. August 11, 1905.
 Section 12, Tp. 39 N., R. 6 E., W. M.
 (North line of section 12.)
 N. $89^{\circ} 59'$ E. on a random line bet. secs. 1 and 12.

- 40.00 Set temp. $\frac{1}{4}$ sec. cor.
- 79.98 Intersect the east bdy. of Tp. 7 lks. S. of
the cor. of secs. 1, 6, 7 and 12.
Thence I run.
S. $89^{\circ} 56'$ W. on a true line bet. secs. 1
and 12.
Through heavy timber and dense under-
growth.
Over level ground.
- 8.00 Begin gradual ascent, over rolling ground,
bears N. 70° W. and S. 70° E. and enter
old burn, brs. N. & S.
- 24.80 Stream 8 lks. wide, course N. 20° E.
- 26.20 Old $\frac{1}{4}$ sec. cor., bears S. 8.15 chs. dist. I de-
stroy cor. and marks on bearing trees.
- 28.15 Stream 5 lks. wide, course N.
- 30.75 Old trail, bears N. 30° E. and S. 30° W.
- 39.99 Set a hemlock post, 3 ft. long, 3 ins. sq. 24
ins. in the ground, for $\frac{1}{4}$ sec. cor., marked
 $\frac{1}{4}$ S. 1 on N. and 12 on S. face, from
which brs.
A fir 6 ins. dia. N. 3° W. 21 lks. dist.
mkd. $\frac{1}{4}$ S. 1 B. T.
A fir 7 ins. dia. S. $31\frac{1}{2}^{\circ}$ E. 12 lks. dist.
mkd. $\frac{1}{4}$ S. 12 B. T.
- 53.20 Stream 6 lks. wide, course N.
- 64.40 Trail, brs. N. & S.
- 70.50 Summit of ascent, bears NW. & SE., 650 ft.
above foot.
- 71.00 Begins steep descent over ledges of rock,
bears S. 70° W. and N. 70° E.

75.20 Stream 10 lks. wide, course N. 30° E. and foot of descent 150 ft. below top.

75.40 Begin steep ascent, bears N. & S.

79.98 The cor. of secs. 1, 2, 11 and 12. 200 ft. above stream.

Land rolling, Soil gravelly loam & rocky, 2d, 3d & 4th rate. Timber, hemlock, fir, cedar & alder. Undergrowth, the same with huckleberry, salmonberry, devil club, cherry & willow. Heavily timbered land and land covered with dense undergrowth, 79.98 chs. (August 12, 1905.)

(7)

4—699

DEPARTMENT OF THE INTERIOR.

OFFICE OF U. S. SURVEYOR GENERAL.

State of Washington.

Olympia, April 1, 1922.

I, Clair Hunt, U. S. Surveyor General for Washington, do hereby certify that the annexed transcript of the field-notes of the survey of section 12, Tp. 39 N., R. 6 E., of the W. M., is a true and literal exemplification from the official field-notes of said survey now on file in this office.

[Seal]

CLAIR HUNT,

United States Surveyor General for Washington.

30-2